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IN EQUITY

United States
Circuit Court of Appeals
For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. DAY, et ali,

Appellees.

BRIEF OF APPELLEES

HARRY L. DAY and JEROME J. DAY

Upon Appeal From the District Court of the United States, District of Idaho, Northern Division.

JAMES E. BABB,
Lewiston, Idaho,
Attorney for Harry L. Day.

ISHAM N. SMITH,
Wallace, Idaho,
Attorney for Jerome J. Day.

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STATEMENT OF FACTS.

Harry L. Day and Jerome J. Day, appellees, contrast plaintiff's allegations with the evidence under topics supported by ample references to the record, and with but little argument or suggestions, followed with references and authorities on the same plan.

All the appellees, excepting Harry R. Allen, Edward Boyce, and the Hercules Mining Company, are owners of undivided interests in the Hercules Quartz Mining Claim and other properties in Shoshone County, Idaho, and are conducting mining operations as the Hercules Mining Company —(a statutory "involuntary" partnership. See First Natl. vs. Bissell, 4 Fed. 701, affd. Bissell v. Foss, 112 U. S.; 5 Sup. Ct. Rep. 851)—under the laws of Idaho.

For many years Damian Cardoner, plaintiff's husband, was owner of an undivided one-sixteenth interest in the Hercules Mine and the statutory mining properties; about 1906, Mr. Cardoner removed from Shoshone County, Idaho, to Spain, where he resided at the time of his death; he died February 25, 1915, testate. Thereafter, his will was held void by the Probate Court of Shoshone County, Idaho, and plaintiff, his relict, Mathilde Cardoner, was adjudged his sole heir, and all of his property within the jurisdiction of that court was distributed to her.

Appellee, Eugene R. Day, is and since he succeeded Harry L. Day in 1912, has been the managing partner of the Hercules Mining Company; upon the petition of Bertha Pouchet, a daughter of the Cardoners, he was appointed administrator of the estate of Damian Cardoner, and acted as such throughout its administration.

The Decree of Distribution in that estate was made, filed and entered October 11, 1916; Mrs. Cardoner appointed Harry R. Allen her agent, and actual possession of the property distributed was delivered to Mrs. Cardoner, the sole beneficiary, October 14, 1916; a certified copy of such decree was duly recorded with the County Recorder of Shoshone County, Idaho, October 25, 1916, at 11:30 A. M., (p. 851).

Decree of Final Discharge of the Administrator was made and filed November 1, 1916, (p. 1308).

On October 28, 1916, Mrs. Cardoner executed a deed and escrow contract with Appellee, Eugene R. Day, (the deed naming appellee, Eleanor Day Boyce, as grantee), whereby she agreed to sell to him her inherited undivided one-sixteenth interest in the Hercules Mining Company and all of its assets, together with one lot in Burke, owned solely by her, for Three Hundred Seventy Thousand ($370,000.00) Dollars, of which, Fifty Thousand ($50,000.00) Dollars was paid cash down, the balance payable, and was paid, within Thirty (30) days, to-wit: November 14, 1916.

Thereafter, on March 19, 1917, Mrs. Cardoner, after publicatoin of the entire complaint verbatim in the Spokesman-Review (record, p. 1012), filed suit to set aside the transaction, charging that it was procured through fraud of Eugene R. Day.

The gravamen of the complaint is that Mrs. Cardoner was of foreign birth, inexperienced in business, ignorant of the values of the properties, and was uninformed of its true value, which she alleges to be at least Twenty Million ($20,000,000.00) Dollars, and of the reasonable value of Thirty Million (30,000,000.00) Dollars—these amounts, inspired more doubtless by the purpose of publishing the complaint first in the newspaper than having it correspond with the evidence, since they are not supported even by plaintiff's evidence, or expert, and while entirely different attorneys are now in charge of plaintiff's case, it necessarily comes to them as it was.

Plaintiff also charges that Eugene R. Day, through

Harry R. Allen, whom she alleged was Day's agent, made misrepresentations which induced the sale, and also charges constructive fraud by claimed breaches of fiduciary relations, to-wit, as administrator, as managing partner and as co-owner, which relations it is alleged, existed at the time of the contract and purchase.

She asserts that Day, as administrator, could not buy her inherited estate; and that, both as administrator and as managing partner and co-owner, Day occupied fiduciary relations to her and was possessed of knowledge concerning the values of the properties involved which he did not divulge to her, and which gave him a dominating advantage over her in the transaction.

APPELLEE ALLEN answered denying her inexperience, etc.; denying that he was Day's agent; denying the misrepresentations; and asserting that he was Mrs. Cardoner's agent in the transaction.

APPELLEES EUGENE R. DAY AND ELEANOR DAY BOYCE answered denying her inexperience; denying all the charges of fraud; denying that Allen was the agent of either of them; and asserting that he was Mrs. Cardoner's agent; and that the transaction was fair, free from fraud of any kind; and that she had been given full information and acted only after independent inquiry and advice; and the price paid for the mine was more than a reasonable value.

APPELLEES HARRY L. DAY AND JEROME J. DAY, who were not parties to the original transaction, answered denying her inexperience, etc.; asserting that they were without knowledge concerning the alleged fraud, and pleading that the price paid was a full consideration; that she had received full information, and made independent in-

quiry; and that they each acquired a one-fourth interest in the former Cardoner interest, *after* the option contract was made; that each paid in full therefor, without knowledge or notice of any fraud, and each received a deed for his interest so acquired. The complaint alleged the theory (p. 25), that whatever one of the Days has been interested in, they have all been partners in, to support the charge that they were all originally parties to the purchase and alleged frauds; but on the trial, her attorney expressly withdrew the allegation and theory (record, p. 980-981).

The deed from Eleanor Day Boyce to Harry L. Day is shown at pp. 1368-1369, and is dated December .., 1916, recorded April 9, 1917.

The deed from Eleanor Day Boyce to Jerome J. Day was given and recorded on like dates. The opinion dismissing appellant's bill is at pp. 1373-1401 of the record.

The record concerning the controverted facts is as follows:

ALLEN'S AGENCY.

Plaintiff alleged (par. 5, p. 14):

"Immediately after the close of the administration in the latter part of October, 1916, plaintiff was approached by defendant Harry R. Allen, who in the transaction next referred to was acting under the direction and in the interest of the defendants Eugene R. Day and Eleanor Day Boyce."

And asserts that Allen stated:

1. That the Hercules Mine was practically worked out;
2. That it was a pure speculation whether any more ore would be discovered;

3. That no dividends were paid for four months when lead was so high in price;
4. That the Days who had charge of the mine were speculating in the metal market with the mine's money and were likely to lose all the money they had;
5. That they were bucking the Guggenheims, and that the Guggenheims had too much money, and the Days would be smashed;
6. That certain people in Spain, claiming under Mr. Cardoner's will, were likely to cause her trouble, and might get her interest in the mine away from her, unless she converted it into cash;
7. That Allen urged plaintiff to sell her interest in the mine as speedily as possible and at the best price she could get, representing that otherwise her interest would very soon be valueless;
8. That as part of the same scheme to procure plaintiff to sell her interest at an inadequate price, Allen figured on paper that the mine was worth only Five Million ($5,000,000.00) Dollars;
9. All of which representations were false and untrue, and were made by Allen for and on behalf of his then undisclosed principals, Eugene R. Day and Eleanor Day Boyce;

Plaintiff alleged that:

10. Plaintiff was greatly alarmed by such representation and believed that she must speedily dispose of her interest or lose it, and thereupon executed authority to Allen to sell her property on the basis heretofore set out;
11. No information was given her concerning any other

property of the partnership;

The complaint. (par. 6) says:

12. "Plaintiff believes, and therefore alleges, that the representations and statements made by Allen, which induced her to make the conveyance aforesaid, were incited and suggested by Eugene R. Day for the purpose of deceiving and alarming plaintiff, and causing her to dispose of her interest in the mine at an inadequate price."

13. "At the time of the transaction, for several years prior thereto, and at the present time," the Hercules properties were of a value of not less than Twenty Million ($20,000,000.00) Dollars, and of the reasonable value of Thirty Million ($30,000,000.00) Dollars, etc.;

14. "Her attention was not directed to the provisions in said conveyance by which she conveyed her interests in all bills receivable, notes, checks, bonds, mortgages and stocks and in and to any and all property of any name, character and description belonging to or owned by the company, whether standing in the name of the company or not."; and

15. "* * * she did not know that the general words used in that decree mentioning bills receivable, notes, checks, bonds, etc., represented any property owned by the Hercules Mining Company, or claimed by it, other than its mines and the mines equipment and the cash on hand. * * * she did not know and no one explained to her that the mining partnership owned any stock or other interests."

in the following properties:

A. The smelter;

B. Refinery; and

C. Ore in transit.

In all of which she asserts a one-sixteenth interest as a member of the partnership.

RETRACTION OF BIZARREE ALLEGATIONS.

(From plaintiff's opening statement at the trial pp. 290-291); MR. GRAVES:

"* * * Now she understood at all times during those negotiations that Mr. Allen was acting as agent for Mr. Day. She never apprehended for one moment that Mr. Allen was her agent. When they came to make the deposit in the bank, Mr. Day had given to Mr. Allen these two checks, and also the deed, which she thought Day executed, to take to the bank. When these two checks, one for forty-five thousand and one for five thousand were delivered to her, Mr. Allen took the Five Thousand dollar check as a commission. And that was the first notice she had, if that was notice to her, under the circumstances, that he was acting as her agent. *Now it may be that in the actual proof of the case we may not be able to show that Mr. Allen was in fact the agent of Mr. Day. I am inclined to think it is not unlikely we may be unable to show that. But we do not regard that as a very material circumstance.*"

(Again, at p. 337):

"MR. BEALE: I wish to object to this class of testimony as incompetent and immaterial, for the reason that there is no connection shown between Mr. Allen and any of the other defendants. I suppose your position in this matter, Judge, is that you will subsequently follow

this with the connection of agency?

MR. O'BRIEN: *I don't think that is necessary. I think the state of this witness' mind is the controlling factor. If she has been induced, it doesn't make any difference from what source, and if she has been overreached as a result of misrepresentation, she can state it."*

MR. BEALE: I make this objection in view of Mr. Graves' statement that they didn't think they were going to prove any—were going to be able to prove any agency existing between Mr. Allen and Mrs. Boyce and the Day boys."

EVIDENCE:

ALLEN WAS MRS. CARDONER'S AGENT.

A. She requested him in August, 1916, at Lake Coeur d'Alene, and from thence enroute, by automobile, to Wallace, Idaho, to act as agent for her.

Allen, pp. 592-593-634.

Wyman, pp. 706-707-708.

W. W. Woods, District Judge, pp. 710-711.

B. Allen thereafter received a statement from Wyman (Rossi Insurance Company) as her agent, and looked after her rent, insurance, accounts, leases, and examined E. R. Day's report as administrator and advised with her thereon.

Allen, pp. 593-594-596-597-598-609 (rents) 635-637-643, Exhibit 49, p. 1310, Exhibit 28, p. 435.

Wyman, p. 708.

C. On October 14, 1916, the estate was delivered to Mrs. Cardoner; thereupon she notified E. R. Day and J. H.

Wourms, his attorney as administrator, that Allen was her agent.

Wourms, p. 960.
E. R. Day, p. 733.

D. The following letters and exhibits, as explained by the witnesses at the following pages, show that Allen was her agent:

Exhibit 49, p. 1310; Allen, pp. 594-598;
Exhibits 19, 20 and 21, pp. 1191-1209; Allen, pp. 606-607;
Exhibits 8 and 9, pp. 1180-1181; Mrs. Cardoner, p. 342;
Exhibit 18, p. 1190; Mrs. Cardoner, p. 418;
Exhibit 11, p. 1183; Mrs. Cardoner, p. 352; E. R. Day, pp. 744-748;
Exhibit 14, p. 1185; Mrs. Cardoner, p. 361;
Exhibit 22, p. 421; Mrs. Cardoner, pp. 421-422;
Exhibit 23, p. 424; Mrs. Cardoner, pp. 424-425;
Exhibit 24, p. 426; Mrs. Cardoner, p. 426;
Exhibit 25, pp. 427-429; Mrs. Cardoner, pp. 427-429;
Exhibit 26, p. 431; Mrs. Cardoner, p. 431;
Exhibit 27, p. 433; Mrs. Cardoner, pp. 433-435;
Exhibit 28, p. 435; Mrs. Cardoner, pp. 435-436;
Exhibit 29, p. 451; Mrs. Cardoner, p. 451;
Exhibit 30, p. 452; Mrs. Cardoner, p. 452.

E. On April 19, 1916, at her first meeting with E. R. Day, she requested back monthly statements of the Hercules Mining Company, which were later furnished. She thereafter received monthly statements up to and including September, 1916.

These statements show, (1) ore in transit, (2) items concerning the smelter and refinery; and she discussed the value of the properties, the smelter and refinery, the Guggenheim rumor, the condition of the partnership property, the failure to pay dividends for four months, and matters pertaining to the mine management with the following persons prior to giving the option of purchase on October 28, 1916:

Allen, pp. 596-598-607-693-696 inclusive.
Paulsen, pp. 683-687 inclusive.
Hutton, pp. 672-673.
E. R. Day—in April, 1916,—720-727,—and at many conversations during the summer—748-749-752, also 790-793 inclusive.

In addition, each monthly statement contained an accurate account of the full amount of dividends paid to that date, the ore shipped for each month, the total receipts for each month, the total dividends for each month, and after the acquisition of the smelter and refinery, showed items relative thereto.

Exhibit 2, February, 1916, p. 1136;
Exhibit 3, October, 1915, p. 1144;
Exhibit 4, January, 1916, p. 1153;
Exhibit 5, July, 1915, p. 1160;
Exhibit 6, August, 1915, p. 1166;
Exhibit 7, September, 1915, p. 1171;
Exhibit 55, April, 1916, p. 1319;
Exhibit 56, May, 1916, p. 1327;
Exhibit 57, June, 1916, p. 1335;
Exhibit 58, July, 1916, p. 1344;

Exhibit 59, August, 1916, p. 1352;
Exhibit 60, September, 1916, p. 1359.

F. Sometime in the Spring or Summer of 1916, E. R. Day, Mine Manager, invited Mrs. Cardoner to visit the mine, and to inspect the books and the partnership properties with anyone whom she might choose. In open court, plaintiff, by counsel, admitted she had never been refused an inspection and investigation of the mine and its properties and several months prior to the trial of the case in open court and during the proceedings on interrogatories, (p. 763), the offer was made to Mr. Graves, her attorney, to permit her in company with anyone whom she might choose to investigate the mine, the mines books and the mines properties.

E. R. Day, p. 763 (tender in open court).
E. R. Day, p. 734 (offer of automobile to take her and anyone she might wish to inspect the mines and properties, etc.)
Mrs. Cardoner, p. 513.

G. She voluntarily suggested the sale to Mr. Day on the 16th day of October, 1916, in her conversation with her agent Allen, and Allen thereafter began negotiations with E. R. Day.

Allen, pp. 600-603 and 635-637-641.
E. R. Day, pp. 735-736-737, et seq.

Mrs. Cardoner had decided to sell before she spoke to Allen about the sale.

Allen, p. 600.

At page 641, Allen says:

"I did not put the idea of selling into her head, she wanted to sell."

E. R. Day, pp. 735-793 (middle) and 794.

H. Up to that time Day had never thought of buying her interest.

E. R. Day, p. 793.

I. During the negotiations, Allen, as agent for Mrs. Cardoner, threatened Day that unless Day purchased the Cardoner interest, he would offer it to Hutton, then to Paulsen, then finally to the American Smelting & Refining Company—the business competitors of the Days.

E. R. Day, p. 740 and pp. 794-795-797.
Allen, pp. 616-617.

J. Allen, for Mrs. Cardoner, demanded one-sixteenth of Six Million ($6,000,000.00) Dollars for the Cardoner interest; Day refused to pay that sum, and told Allen when he made his last offer that he was through, to offer it to anybody else.

E. R. Day, pp. 736-737-804.
Allen, pp. 604-605, also 616-617.

K. On October 29, 1916, at the Old National Bank in Spokane, Washington, Mrs. Cardoner paid Allen Five Thousand ($5,000.00) Dollars as his commission, and did not claim that he was not her agent.

Vincent, pp. 698-702.
Allen, pp. 662-664.

L. Both Allen and Day swear that Allen represented

Mrs. Cardoner and never represented any of the Days.

Allen, pp. 591-653-655.
Day, p. 744.

At no place does Mrs. Cardoner testify that Allen represented any of the Days.

Entire Record.

M. The reasons Day considered the purchase of the Cardoner minority interest were, to obtain control of the majority interests in the mine, to protect the large interests in the properties which the Days already owned, to exclude any foreign adverse interests, and to preserve the friendly partnership.

Allen, pp. 604 (top)-610.
E. R. Day, pp. 797 (middle)-809 (middle).

When Harry L. Day and Jerome J. Day agreed to purchase part of the Cardoner interest from E. R. Day and Eleanor Day Boyce, these same considerations controlled them as they thought the price too high.

Harry L. Day, pp. 975-976-977.
Jerome J. Day, pp. 1005-1013.

N. Allen denies categorically each misrepresentation charged against him.

Allen, pp. 611 to 617-711.

O. Mrs. Cardoner told Allen and Day of her family troubles in Spain; requested each of them at different times to keep her transactions out of the paper and to keep knowledge

of it away from her daughter and Attorney Wilson, one of her original attorneys of record in this case.

Allen, pp. 599 and 600-612-648.
E. R. Day, pp. 716 to 718-782.

(NOTE:—Wilson was employed by Mrs. Cardoner in December, 1916, to settle trouble with Bertha over property in Spain. WILSON, pp. 581-582).

P. At the time the deed was executed Mrs. Cardoner's mental and physical condition was good; she was bright and capable mentally.

E. R. Day, p. 770.
Allen, pp. 668 and 669.
Mrs. Allen, pp. 877 and 878.
W. W. Woods, District Judge, p. 876.

CONFIDENTIAL RELATIONS.

Eugene R. Day as Administrator, Managing Partner and Co-owner.

Numerous charges of mala-fides are made in the complaint against Mr. Day in the capacities above stated. They are so interwoven with other allegations that the matters should be considered seriatim, as alleged, rather than in separate sub-heads. We shall show first, the statements in the complaint; and second, the evidence.

PLAINTIFF'S ALLEGATION NO. 1:

At paragraph 5, pp. 13 to 16, the complaint charges:

Mrs. Cardoner's ignorance of business and mining affairs; her ill-health; that her husband formerly managed their property affairs, gave her no information relative thereto, except general knowledge; after his death, she knew nothing

of the values of their property, or its earnings, except that the earnings were large;

THE EVIDENCE:

Mrs. Cardoner Testified: (references are to pages of record)

Suffers from asthma; lives in Albuquerque, New Mexico, because of illness; built her home there (320); in 1906, husband sold business, but not store, at Burke (320), moved to Spain, where resided at time of death, February 28, 1915 (321); he owned store at Burke and 1-16 of Hercules Mine, and conducted his business his own way without her (323);

She was born in France, married in Switzerland, came to Burke long ago (324); husband transacted business himself (325);

For years she has kept diary (325) (constantly referred to it for dates). Was very bad sick on October 28, 1916 (326).

April 19, 1916, came to Wallace, asked Mr. Day for monthly statements she had not received (327); on August 3rd again saw Mr. Day and asked for statements again (328); after her husband died, she received no statements until Mr. Day gave them to her in April, 1916, (329). Day never explained statements (Ex. 2, 3, 4, 5, 6 and 7) (330);

In August, 1916, saw Mr. Wyman about her real estate in Burke (331) the houses were in bad condition, and she and Wyman examined the store (332);

October 12, 1916, went to Wallace to see about distribution of the estate; both District and Probate Courts

were in session; on October 14, 1916, property delivered to her (333);

Next saw Mr. Day, October 28, 1916, (333) Allen acted for her in relation to lease on house, insurance (336) looked after her insurance from store tenant, rents on store and sold her bank stock (358); got receipt from E. R. Day for $5,000.00 fees as administrator (360).

Cross-examination of Mrs. Cardoner by Mr. Gray:

October 14, 1916, showed Mr. Allen letter from E. R. Day to her, and went over final distribution papers with him (376); asked him if account given her by Mr. McNaughton (Mr. Gray's assistant) was correct (377); she showed Mr. Allen where she thought a mistake was made and examined Exhibits No. 15 and No. 16 with him (379); told him—"you can look after the rents and everything after the house, you know" (380); she discovered what discrepancy existed between McNaughton's statement and E. R. Day's account (388-390) in Exs. 15 and 16, found the figures did not agree (390 to 393) and asked Allen to check them for her and explain (393-394), which he did, per Ex. No. 17, (394).

Her correspondence shows her familiarity with business affairs, and a full understanding of her matters.

See exhibits as follows:

Exhibit 8, p. 1180;
Exhibit 9, p. 1181;
Exhibit 22, p. 421;
Exhibit 23, p. 424;
Exhibit 24, p. 426;
Exhibit 25, p. 427;
Exhibit 26, p. 431;

Exhibit 27; p. 433;
Exhibit 28, p. 435;
Exhibit 29, p. 451;
Exhibit 30, p. 452;
Exhibit 34, p. 500;
Exhibit 35, p. 505;
Exhibit 36, p. 508-510.

Cross-examination of Mrs. Cardoner by Mr. Beale:

She was born in France in 1853; married in Strasburg under the French law, before it became German (454); Bertha was born in Berne, Switzerland, and she came to the United States with Bertha, located in San Francisco, and Mr. Cardoner came later (455);

From San Francisco, she went back to France, thence to Murray, Idaho, (457-458), in 1886 or 1887, where Mr. Cardoner was in business (458). She helped what she could, and at times had charge of the store (458); when Mr. Cardoner went to Burke she had charge of the store at Murray (458); and ran a cigar store (459);

From Murray she went to Missoula, thence to Helena (495); thence to Burke (460). At all the times she kept a diary (460); her husband ran a general merchandise store at Burke, and while living there, she brought suit for divorce; in her complaint at paragraph 6 (463-464) she showed knowledge of his business, income, properties, worth, value of Hercules and other properties;

At her divorce trial, she testified to the size of stock of goods in the store, rental, values of properties, husband's income, his financial condition, his business man-

agement and his properties in mining claims including the Hercules and Hummingbird and Sonora (pp. 465-466-467); and that at Murray, Idaho, she worked in the store "all the time"; and that at Burke "he left me in the store" (p. 466); and showed knowledge of the details and criticized the business methods. This store, a three-story building with living apartments above the store-room, was in the vicinity of the Hercules Mine;

In the Damian Cardoner Estate, she defeated her husband's will, (Exhibit 33) and elected to assert her community property rights instead of taking under the will (Exhibit 32);

After their removal to Spain, Mr. Cardoner engaged in the mining business with which she was familiar (471 to 474); she knew of the estate in Spain, of the money her husband had in the bank, that he kept a safety-deposit box (477); that Mr. Pouchet got her husband's private papers, and that she got some of her husband's cash from the bank in Spain (478); she knew that her husband got monthly statements from the Hercules Mining Company (479);

The Cardoners, while in Spain, subscribed for the Wallace, Idaho, Press-Times and the Spokesman-Review of Spokane, Washington, from which she read articles about the mines (480); knew of the necessity for having her husband's naturalization papers to enter the United States, and the necessity for exhibiting those papers to the immigration officers (482); that the naturalization papers were taken from the safety-deposit box in Spain (482);

She says that she got the monthly statements from E. R. Day in April, 1916, for her daughter, but cannot

tell why she did not send them to her (485-486); that she read the statements, but didn't nuderstand them (487) but claims she never saw the items in the February, 1916, statement relative to the Pennsylvania Refinery and Northport Smelter (489);

Again, she admits finding the alleged discrepancies between the McNaughton account and Eugene R. Day's report as administrator, of $32.65, and explains how she discovered it (494-495); she also admits that she knew from the account (Exhibit No. 15) that the estate received in dividends the sums shown on the report and that the dividends paid the estate which were turned to her in the settlement were $105,500.00 (496).

The other witnesses refer to her as follows:

DR. AHLQUIST, (plaintiff's physician), says:

She talked very intelligently about the different places she had visited before going to his office (315); she was a very interesting character (316); that is, she talked in an interesting, intelligent way; and he concluded she was a woman of intelligence and broad experience as a traveller (316).

Allen says, she was a careful, prudent, keen business woman (667).

Her mental condition was good on October 28th, when the deed and escrow were signed:

Allen, pp. 666-667-668;
E. R. Day, pp. 473-770-744;
W. W. Woods, District Judge, p. 876;
Mrs. Allen, p. 878.

Mrs. Cardoner formerly taught French while re-

siding in the Coeur d'Alenes. She also ran her husband's grocery store.

Judge Woods, p. 710;
H. R. Allen, p. 591.

Her correspondence with E. R. Day shows her knowledge of affairs, fluent use of good English, and understanding of his correspondence.

Exhibit 10 (346); Ex. 34 (500); Ex. 35 (505); Ex. 36 (505);

and in settling with both E. R. Day and Harry R. Allen, she demanded receipts for ~~same~~ sums paid them for services. (Ex. 13, p. 361 and Ex. 14, p. 361).

PLAINTIFF'S ALLEGATION NO. 2:

Complaint, Par. 5, pp. 13-14:

She knew Day was successful manager for long time, and trusted his integrity and hence, desired him appointed administrator.

EVIDENCE:

Certified copy of Petition for Appointment of Administrator shows that Bertha Pouchet, and not Mrs. Cardoner, procured Mr. Day's appointment. (Ex. 37 p. 1231).

PLAINTIFF'S ALLEGATION NO. 3:

Complaint, Par. 5, p. 14:

After Day's appointment as Administrator she sought information from him about the values of the properties, which he did not give but evaded giving; while administrator, he paid two dividends, only, in order to mislead her, though the profits of the mine warranted more frequent dividends; and, while Administrator,

Day sought to buy her property.

EVIDENCE:

DAY SAYS:

"She was interested in knowing every detail concerning the business. She wanted to know every particular thing, and did know it too, as near as I could tell her." (p. 730).

"I gave Mrs. Cardoner all the information that I had that was available of giving, and I have given every Hercules owner every information I have regarding that property." (729).

She visited him—"a dozen" times—during the Summer (1916) and each time they went over the "entire business";

Day, pp. 729-730-731-778-780-781.

He says:

"I gave Mrs. Cardoner a full account of all the operations that were going on (752); * * * "No, I never concealed a thing from Mrs. Cardoner pertaining to that business (752).

"The advantage, I told her, of having the stock (meaning smelter and refinery stock) was simply this, that I considered the business of the parnership better than it ever had been before. That by having a connection with the smelter and refinery we were able to see the ore from the itme it was broken in the mine, through all its processes to the market; that we received and would receive all that there was in it, the by-products and that we would get in general all that there was in the ore (723-726).

During these conversations Day told her of the new mill, the ore in transit, why the dividends were small, the smelter, the refinery, the work below the Hummingbird tunnel, the disclosures of ore therefrom, the reasons which impelled the Hercules Mining Company to embark in the smelter and refinery business, and offered to let her go through the properties in company with whom she might choose, and to inspect the mine, the mill and the books at any time.

Day—Direct examination 720 to 730;—Cross-examination 771 to 794.

The number and amounts of dividends were accurately shown on the monthly statements, and during the administration Mr. Day paid the following sums to the Cardoner family: (Ex. 16, pp. 1187-1188):

Sept. 13, 1915	Mrs. Bertha Pouchet	$ 2,000.00
Sept. 30, 1915	Mrs. Bertha Pouchet	14,630.80
April 20, 1916	Mathilde Cardoner	2,000.00
August 30, 1916	Mathilde Cardoner	2,000.00
	Total	$20,630.80

And at the close of the administration, and when the estate was delivered to Mrs. Cardoner on October 14, 1916, she received from accumulated dividends, the sum of $117,695.92 (Ex. 16, p. 1189) in checks on the banks there named.

Day never sought to buy her property during the administration, or at all. The first intimation he had that Mrs. Cardoner wanted to sell was when Allen, her agent, approached him in October, 1916, after the rendition of the final decree of distribution.

Day, pp. 735-736 (top);
Allen, pp. 600-603.

PLAINTIFF'S ALLEGATION NO. 4:

Complaint, Par. 5, pp. 14 to 17:

Immediately after the administration was closed Allen, as Day's agent, approached her seeking to buy her interest for Day, and made the false statements (heretofore discussed) which so frightened her that she executed the option to purchase, authority to sell, and the deed.

EVIDENCE:

These facts have been sufficiently shown heretofore.

PLAINTIFF'S ALLEGATION NO. 5:

Complaint, Par. 5, pp. 16-17:

In making the first $50,000.00 payment on the contract Day issued two checks; one, for $45,000.00 and the other for $5,000.00; this was part of a scheme to enable Allen to charge her $5,000.00 commission, and thereby appear as her agent.

EVIDENCE:

The evidence shows that October 28, 1916, (when the checks were written) Mr. Day had deposits in three banks, only, to-wit:

Wallace Bank & Trust Co.	$48,797.07
Exchange National Bank (Spokane)	8,842.00
Fidelity National Bank (Spokane)	211.44

(Ehxibit No. 51 p. 1312).

He issued two checks because he did not have enough money in any one bank to pay the full $50,000.00:

E. R. Day, pp. 744 to 748.

He had no thought of Mrs. Cardoner's agent, nor paying him, nor of any such matters as the complaint charges.

E. R. Day, p. 747.

PLAINTIFF'S ALLEGATION NO. 6:

Complaint, Par. 6, pp. 18-19:

She sold upon the basis of $5,000,000.00 for the ~~mine~~ mine and "all assets of the co-partnership known as the Hercules Mining Company (Ex. 18, p. 1190)"—plus 1-16 of the cash on hand (then estimated at $600,000.00) her estimated portion being $37,500.00, with added price of $20,000.00 for the lot in Burke, which was her sole property.

The mine was worth $20,000,000.00 and was reasonably worth $30,000,000.00, and her interest in the cash was more than she received, as the actual cash on hand exceeded $600,000.00.

EVIDENCE:

Her complaint does not seek recission of the sale of the Burke real property, unless the contract is held entire. (Complaint, Par. 8, p. 24).

The cash estimate of $600,000.00 was $278,838.35 more than the true balance.

E. R. Day, ans. Int. No. 21, p. 95.
Jerome J. Day, p. 1012.

The amount paid for her 1-16 interest on a basis of $5,000,000.00 was a fair approximation of the value of the mine and its properties and assets and, in all reasonable probability, was in fact in excess of such value, so far as they were and are capable of being estimated, reasonably.

(a) In 1905, when the mine was eleven years younger than at the time Mrs. Cardoner sold, the Reeves 1-16 interest brought $250,000.00 (basis $4,000,000.00 for entire property) and the Samuels interest sold on same basis.

E. R. Day, p. 755.

(b) In 1905, F. M. Rothrock, the Day family and also Damian Cardoner, gave option to John B. Adams to purchase their respective interests, basis $4,000,000.00 for entire mine. Several hundred dollars were paid on this option, which was afterwards dropped.

E. R. Day, p. 758;

Folsom, pp. 886-887-890;

Rothrock option, Ex. No. 53, p. 1312.

(c) In 1906, J. P. Graves, of Spokane, had option for entire properties, basis $6,000,000.00. Cash payment of $20,000.00 was made and thereafter option dropped.

Folsom, p. 888;

E. R. Day, p. 756.

(d) The following co-owners in the Hercules Mining Company fix the price paid as "all it was worth" and probably in excess of its value, reasonably estimated.

Paulsen, p. 686 (top);

Hutton, p. 672;

(especially) 992;

H. L. Day, pp. 963-976 and 980 to 990—

J. J. Day, pp. 1001-1002-1013;

E. R. Day, pp. 804 to 810; 736 to 744.

(e) The following experts show that the sum paid was equal to or in excess of a fair approximation of the value of the properties and that the prseent value of the probable profits will not exceed nor equal the price paid.

Burbidge (manager of Federal Mining & Smelting Co.) pp. 901-906—and fixes the present value of Mrs. Cardoner's 1-16, on Oct. 28, 1916, at $293,405.00,—p. 907.

Allen, pp. 620-622; 638-639; 649-650; 652.

Greenough (plaintiff's expert) pp. 1101-1102.

PLAINTIFF'S ALLEGATION NO. 7:

Complaint, Par. 6, p. 18 et seq.

Allen's false statements were incited by Day; for the purpose of deceiving and alarming her, and forcing her to sell at inadequate price.

EVIDENCE:

See discussion of Allen's agency, heretofore made.

PLAINTIFF'S ALLEGATION NO. 8:

Complaint, Par. 6, p. 19:

Had she known the true value of the properties, and had she not been frightened by Allen's false representations, she would not have sold.

EVIDENCE:

"I did not put the idea of selling into her head; she wanted to sell."—Allen, p. 641.

See references heretofore under Allen's agency, Mine Values, etc.

He advised her to leave Bertha's share intact.

Allen, pp. 615-616.

PLAINTIFF'S ALLEGATION NO. 9:

Complaint, Par. 6, pp. 19-20:

At the time she executed the deed she either did not read it, or read it or it was read to her in a most casual manner. Her attention was not called to the provision relating to bills receivable, notes, checks, bonds, mortgages, stocks, and any and all property of any name, character and description. She believed and was lead to believe that the only property owned by the company was its mines, machinery and fixtures, cash on hand derived from its operation and not then distributed as dividends; and at the time of the distribution of the estate of her husband, she did not know that the same general words, which were in the decree of distribuiton, represented any property other than the mines and equipment and cash on hand; neither E. R. Day or anyone else explained to her the meaning of those words, and she did not know that the partnership owned any interest in any smelter, refinery, or that there was any ore in transit, or its value.

EVIDENCE:

The deed was prepared Oct. 28, 1916, and was executed in the evening about 8:00 or 8:30 p. m. Mrs. Cardoner noticed that the deed ran to Mrs. Boyce, mentioned that fact, glanced through the descriptions of the mining claims, and came to the last two pages and went over them rather carefully.

Allen, 624—especially 625—656-657-658—especially 658 and 659—(the description in deed

was taken from the decree of distribution) 656.

Mrs. Allen, pp. 878-879;

Wourms, pp. 957-958-959—says, told her what general clause in decree carried; that it carried smelter and refinery stocks and all book assets.

E. R. Day, pp. 743-744. ("Mrs. Cardoner says, 'This takes all of my property, everything,' and Allen said it did").

Mrs. Cardoner knew of the smelter and refinery, the ore in transit, and she discussed the questions of values, smelter and smelter business, refinery, ore in transit, cash reserve, failure to pay dividends for several months with several witnesses before the execution of the deed, and was informed by Allen from the monthly statements she gave him of the items relating to the smelter, refinery, ore in transit, etc.; she also discussed the advisability of acquiring such interests in the smelter and refinery and criticized the management thereon.

Allen, pp. 596-598-607; 693 to 696 inclusive;

Paulsen, pp. 683-687;

Hutton, pp. 672-673;

E. R. Day—In April, 1916, and at many other conversations during the Summer, she went over each item of assets and everything pertaining to the mine and its properties.

pp. 720 to 727; 748-749; also 790 to 793 inclusive.

Each monthly statement contains an accurate statement of the full amounts paid as dividends from the first

dividend on down; sets out the number and amount of dividends for each current month; the total receipts item by item; the ore shipped; receipts from ore sales and items relating to the smelter and refinery are found in each monthly statement which was issued after such properties were acquired.

Exhibits 2, 3, 4, 5, 6, 7, 55, 56, 57, 58, 59, 60.

PLAINTIFF'S ALLEGATION NO. 10:

Complaint, Par. 7, pp. 20-21:

Day had been general manager of the mine and its properties for years; was paid a salary by the partnership and was their agent; was an experienced mining man, capable of judging ore bodies and their values; knew every detail relative to extent and value of ore bodies, the cost of mining and marketing ore; knew of the probable permanency and value of ore bodies, the demand for ore and the value thereof; was familiar with the smelter at Northport and the refinery at Pittsburg and the advantage of ownership by the partnership in those properties; and the probable increased future profits therefrom.

EVIDENCE:

Day became manager about 1912; he was paid a salary by the partnership as manager; he was not a mining engineer, but a practical mine operator and manager; he could judge ore bodies only when they were exposed; his knowledge of the mine was such as he had gained as manager; in the prosecution of the work, the Hercules Mining Company did not develop a great deal of ore bodies, but took the ore as it came; Day knew the

market values of ore and dealt with the smelter at Northport.

He explained to Mrs. Cardoner fully about the smelter and the refinery, told her why those properties were necessarily acquired, told her the advantage which their Herclues Mine gained because of owning stock in both the smelter and refinery, and explained to her that the partnership prospects for profits were better than ever and that they could see the ore from the time it was broken, through all its changes, to the market.

Paulsen, p. 692;

Day, pp. 725 to 727; 731; 748 to 749; 766 to 767; 780; 781 to 790.

Mrs. Cardoner criticized the management for the smelter and refinery transaction and expressed her disapproval to both E. R. Day and Paulsen, at different conversations.

Day, pp. 726; 727; 775; 781;

Paulsen, pp. 685.

PLAINTIFF'S ALLEGATION NO. 11:

Complaint, Par. 7, pp. 22-23:

As administrator, Day had become familiar with her husband's affairs, knew of the possibility of some question being raised about Mrs. Cardoner's right to inherit, and knew the general business and financial condition she would be in when the administration closed.

He knew she was joint owner in the mine with him; knew that her husband, in his life-time, trusted him, and as administrator had gained her confidence.

She trusted her husband during his life-time and

knew nothing of his business except in a general way.

EVIDENCE:

Mrs. Cardoner, herself, had defeated her husband's will:

Exhibits No. 32 (p. 1120) and No. 33 (p. 1224).

She was well acquainted with his business. She had discharged E. R. Day and had another agent and other advisers, including separate attorney, John P. Gray, well known in mining circles.

Discussion heretofore.

PLAINTIFF'S ALLEGATION NO. 12:

Complaint, Par. 7, pp. 22-23:

She had at no time any knowledge as to the value of the Hercules Mining claims; nor of the different properties owned by the partnership; nor of the smelter or refinery, and had she known of them, she had no knowledge as to the extent and profits of the partnership or what might probably be expected in its future operations.

EVIDENCE:

Her divorce complaint and testimony in great detail disclosed accurate knowledge of her husband's affairs at the time it was filed in January, 1903 (p. 465).

Divorce Complaint, Par, 6, set out pp. 463-464.

Divorce Testimony, pp. 465 to 468.

Her extensive itinerary, knowledge of affairs in general, talks with E. R. Day, with Mr. Paulsen, Mr. Hutton, Mr. Allen, and others, about the mine, its values and the advisability of selling; her knowledge of reading

and writing the English language; her ability in checking complicated accounts; her experience as helper in running her husband's store, in close proximinity to the mine; her reading in Wallace, Idaho, and Spokane, Washington, papers of net profit statements of the mine for taxation; and her scholarship as teacher of French, have been heretofore shown.

E. R. Day, pp. 787-788, says:

"Q. Now in these various conversations beginning with April and running down to whenever they did run to, did she discuss the settlement of the estate with you?

A. She did discuss the settlement of the estate.

Q. In each one?

A. At all times she discussed that.

Q. Now what would she ask you about the settlement of the estate?

A. Well, she said many things in reference to it, that she wanted to get it settled up and that she wanted to get the money.

Q. She said that in April?

A. Yes.

Q. And in each of the other conversations?

A. *That was the main reason for her coming here to find out about the business and get everything terminated.*"

Harry R. Allen gives this testimony, (p. 641):

"Q. Didn't you tell her all about all of the elements that you have repeated here in your direct examination of reasons why you thought she should seriously consider the question of selling?

A. I did not put the idea of selling into her head. She wanted to sell."

And at pages 615 and 616, he says:

"Q. Mr. Allen, was that the conversation at which you advised her to go and talk with Mr. Hutton and Mr. Paulsen and her lawyer?

A. Yes, sir. I don't know whether I have testified to this or not, but either at that time or later on I asked her if it would not be a good idea for her to sell her share and leave Bertha's intact."

On October 14, 1916, the Cardoner Estate was settled and the property turned over to her. Mr. Day gave her a statement of the affairs of the estate which is Exhibits No. 15 and No. 16 (pp. 1185 to 1189).

Mrs. Cardoner checked this account herself, and discovered the two alleged discrepancies, and immediately and on October 14, 1916, she went to Allen, pointed them out to him and asked him to investigate and explain them, which he did.

Mrs. Cardoner, pp. 378 to 380;
Allen, pp. 593 to 596. Exhibits No. 17 (pp 1189-1190) and No. 49 (p. 1310).

The deed to Eleanor Day Boyce executed October 28, 1916, describes the same property which she received in the Decree of Distribution.

Compare Ex. No. 46, pp. 1275 to 1307 with the copy of deed set forth as Ehibit "A" to the amended complaint (pp. 28 to 54) and with the abstract of such deed, (Ex. No. 10, pp. 1182-1183).

When she first talked of selling her interests, she

told Allen she—"Wanted to clean—she wanted to clean up on her holdings up there in the Coeur d'Alene country for the reason that she was afraid that this son-in-law would cause her trouble.

Allen, pp. 605-606.

PLAINTIFF'S ALLEGATION NO. 13:

Complaint, Par. 7, p. 23:

At no time during the negotiations leading up to the contract of October 28, 1916, and the deed, or at any other time did E. R. Day or Eleanor Day Boyce, or any one else, disclose to her the true matters and things pertaining to the value of the mines and mining partnership property or any statement or explanation as to their values, or probable future values, or probable future earnings or any disclosure that tended to disclose to her the value of the property rights in those mines and the assets of the partnership, EXCEPT the false and fraudulent statements of Allen.

E. R. Day well knew her ignorance, and that had he disclosed such information to her, she would not have made said contract and deed.

EVIDENCE:

Three days after the date of the final decree of distribution and on October 14, 1916, and after her agent Allen had examined the final account and having had an attorney during administration, separate from the attorney for E. R. Day as administrator, she received actual possession from the administrator of the property described in the Decree of Distribution; also, the account of

E. R. Day as administrator, and gave notice that Allen was her agent. (Exs. Nos. 15 and 16).

She theretofore had received the various monthly statements with a full itemized account of the business for each respective month; had talked with E. R. Day at various times from April 19, 1916, to October 14, 1916; and had meanwhile, talked with Paulsen, Hutton, Allen and Mrs. Woods as heretofore shown.

Each monthly statement showed:

1. The entire sums paid out as dividends;
2. The particular dividends and the amount thereof for the current month;
3. The ore shipped each month;
4. Returns from ore sales, each month;
5. Amounts expended on both smelter and refinery from their acquisition;
6. A particular itemized statement of every receipt and disbursement; and
7. Day explained to her that it takes from three to four months to get returns from smelter.

Day, pp. 726-775-783.

She made up her mind to sell, as heretofore shown; and Allen got E. R. Day to pay the "top price" (650); and Day reached the point where he told Allen that he was "through" and to take the property to others (737 et seq).

All these matters have been heretofore sufficiently shown.

PLAINTIFF'S ALLEGATION NO. 14:

Complaint, Par. 7, p. 23:

Day well knew her igonrance on these subjects and well knew that she would not have sold, nor executed authority to sell if he had disclosed either the properties owned by the partnership or their values, to her.

EVIDENCE:

The Decree of Distribution contained the same properties described in the deed. Her statement of the property of her husband, as set forth in Par. 6 of her Divorce Complaint contains properties then owned, and the monthly statements contained the smelter and refinery; the ore in transit, the ore shipments, etc., and in the sale, she was informed of the cash on hand not distributed because it was a circulating or revolving capital fund, and she received her portion thereof on an estimate which was $278,838.35 over the true cash balance.

See discussions of evidence heretofore.

Mrs. Cardoner made up her mind to sell (Allen, pp. 605-606) (641); consulted her co-partners Paulsen and Hutton on the advisability of such sale; advised with Mrs. Woods and Allen as to the price, told both Allen and E. R. Day of her troubles with her son-in-law and assigned that as a reason for sale; and Allen advised her to retain at least Bertha's interest in the mine and sell only her own (Allen, pp. 615-616).

PLAINTIFF'S ALLEGATION NO. 15:

Complaint, Par. 8, pp. 23-24:

She discovered the "fraud" practiced on her, in

December, 1916; elected to rescind; tendered purchase money back to E. R. Day and Eleanor Day Boyce and demanded re-conveyance; both were refused.

EVIDENCE:

Her attorney, Wilson, told her in New Mexico, on December 4, 1916, without having examined the property and without knowledge as to it or its value, that she had not received enough. He left for Spokane and Wallace on December 6, 1916, and—"found out things" —returned December 18, 1916, to New Mexico.

Mrs. Cardoner, pp. 363 to 366; 447 to 449;
Wilson, pp. 579-580.

Neither Mr. Wilson nor Mrs. Cardoner tell what it was Mr. Wilson—"found out"—nor the source, reliability accuracy nor credibility of what it was he—"found out."

Wilson received a contract for 1-12 of the recovery entirely contingent.

Wilson, pp. 583-586.

PLAINTIFF'S ALLEGATION NO. 16:

Complaint, Par. 8, p. 24:

She has no desire to rescind as to the Burke real estate; but if the Court should hold the contract entire, she will do so; claims she is entitled to a recission and accounting and avers her readiness to do equity.

EVIDENCE:

In addition to the fact that Mrs. Cardoner is satisfied with the sale of the Burke real property, she re-received $37,500.00 as her part in the cash on hand then

estimated at $600,000.00; whereas the true cash on hand was only $370,521.13.

E. R. Day, Ans. Int. No. 21, p. 95;
Jerome J. Day, pp. 1011-1012.

She ~~as~~ was overpaid in the cash item, by more than $14,342.43.

PLAINTIFF'S ALLEGATION NO. 17:

Complaint, Par. 9, pp. 25-26:

Allegations asserting her right to an accounting and to a discovery; that she is still a member of the partnership but is wrongfully excluded from participating in its properties and profits and that for a full adjustment of all her equities, all the partners are necessary defendants.

EVIDENCE:

Mrs. Cardoner was never denied an inspection of the books, the properties or the affairs of the partnership.

Mrs. Cardoner and Mr. Graves—p. 513.

During the proceedings relative to interrogatories, in open court, defendants offered her the right to inspect the mine, the books and the properties which her counsel refused in open court, and preferred to depend upon Mr. E. R. Day's answer to the interrogatories.

E. R. Day, p. 763.

From April 19, 1916, to October, Mr. E. R. Day as mine manager had a standing offer to her to visit the mine with whom she wished, and to inspect the properties, the books and the condition of the partnership.

E. R. Day, pp. 734; 720-721.

SIZE, VALUE AND EXTENT OF KNOWN ORE BODIES ON OCTOBER 28, 1917.

PLAINTIFF'S ALLEGATION NO. 18:

Complaint, Par. 6, pp. 18-19:

The ore bodies were better developed and more valuable than ever before, and the price of metals was higher, and the mine was earning more money at the time of the transaction than it ever had before.

EVIDENCE:

Earnings of Mine:

Witness Paulsen, pp. 691-692:

Q. "You mined more in the first ten months of the year 1916 than you had mined in any previous year, didn't you?

A. "Well, I presume the reason we mined more, the prices were getting to be good.

Q. "Pardon me, Mr. Paulsen, you did mine more, didn't you?

A. "Well, I couldn't say; the figures will show that. If you have got the figures they will show that.

Day, p. 842.

Eugene R. Day answered certain interrogatories propounded by plaintiff. The questions and answers bearing upon this factor are:

Interrogatory No. 12, p. 57; Answered, p. 65.

Interrogatory No. 13, p. 57, Answered pp. 66 to 72.

From which we furnish the following tables:

ORE SHIPPED.

YEAR	TONS Wet	TONS Dry		DRY TONS % LEAD	DRY TONS OZ. SILVER	Per Cent Calculated	AVERAGE PRICES OF LEAD	AVERAGE PRICES OF SILVER	AVERAGE PRICES OF ZINC
1901	362	329		59.84	132.13	2.28	4.36		4.085
1902	5,003	4,840		62.34	83.92	1.34	4.10		4.90
1903	10,043	9,571		62.28	89.69	1. 2	4.26		5.62
1904	12,266	11,505		56.40	77.55	1.,7	4.32		5.17
1905	11,422	10,485		55.47	68.81	1. 4	4.705		5.995
1906	17,712	17,072		57.53	58.55	.01	5.66		6.275
1907	20,466	19,755		54.20	54.29	.00	5.35	65.32	6.205
1908	19,445	18,717		56.61	52.55	.928	4.236	52.85	4.74
1909	17,950	17,656		54.16	47.01	.868	4.30	51.50	5.52
1910	25,765	23,959		46.	38.87	.845	4.45	53.49	5.66
1911	31,399	29,989		49.79	44.89	.901	4.46	53.30	5.91
			Conc.	47.23	37.52	.794			
1912	33,997	32,642		44.06	40.44	.917	4.485	60.83	7.11
			Conc.	48.18	39.34	813			
1913	40,816	39,664		**52.02**	**42.65**	.819	4.40	59.795	5.80
			Conc.	54.91	41.77	.778			
1914	60,560	58,929		57.32	52.61	.917	3.87	54.81	5.30
			Conc.	55.76	46.56	835			
1915	49,442	47,783		51.20	39.61	.773	4.675	49.685	14.44
			Conc.	53.14	58.57	1. 00			
1916	70,026	68,063		47.29	35.40	.747	6.83	65.66	13.75
			Conc.	47.95	34.33	.715			

NOTE—1916 calculations to October 28, 1916, only.

The average annual prices of silver, lead and zinc from 1901 to 1916 are set forth at the following places:

Exhibit No. 62 (Defendant's exhibit) p. 1369.

Exhibit No. 64 (Defendant's exhibit) pp. 1370-1371.

ORE BODIES.

The following witnesses established the following characteristics and facts concerning ore bodies in the Coeur d'Alenes:

(a) They are lens-shaped; they peter out gradually unless cut off by a fault;

Burbidge, (Manager Fed. M. & S. Co.) p. 932;

H. L. Day, p. 978;

E. R. Day, p. 817 (Middle).

(b) They shorten up, get narrower and baser or the values diminish and the porperty gets poorer with depth.

Burbidge, (Manager Fed. M. & S. Co.), pp. 901-902;

H. L. Day, p. 978;

E. R. Day, pp. 66 to 72 (Answer to interrogatory No. 13, tabulated, supra).

These facts are true of all the neighboring mines to the Hercules;

Burbidge (Manager Fed. M. & S. Co.), p. 901 (bottom) 904-919 and 920-1125 (middle);

Allen, pp. 612-613;

H. L. Day, pp. 979-980;

J. J. Day, 1001-1002-1006 to 1009-1013, (bottom).

E. R. Day, p. 728 (told Mrs. Cardoner of Tiger) 727 (bottom); 820; also 762 (bottom).

(c) In the Hercules Mine, there were three ore shoots at the Hummingbird or No. 5 tunnel; the development work done after October 28, 1916, demonstrated that the east ore shoot had petered out or cut-off; the middle ore shoot was raking to the west ore shoot and indications were that it was merging with it and would so merge with it at or about the 800 level; and the west or large ore shoot was shortening and had shortened from 100 to 125 feet, and had narrowed from 15 feet in width to 12 feet in width.

These witnesses tell of the ore shoots, their length and width, at the Hummingbird or No. 5 tunnel; and the showing made by the work below it.

E. R. Day—(Speaking from memory and approximating distances.) pp. 824-825; says:

At No. 5 tunnel, east ore shoot is 160 feet long; west or shoot, about 600 feet; middle ore shoot (not given).

After extended cross-examination pp. 833 to 866, he says on re-direct examination:

Length of ore shoots at No. 5 or Hummingbird tunnel; (pp. 867 to 869) east ore shoot is 125 to 150 feet long; middle ore shoot is 250 feet long, (not sure) west ore shoot is 600 feet long.

And states that the east ore shoot "cut-out" before it reached the 200 level below that tunnel; and "west" ore shoot had "shortened up"

about 125 feet; and at the 600 level it had "shortened" 125 feet; and the indications were that the middle ore shoot was merging with the "big" ore shoot (west).

Q. You mean submerge?

A. Yes, absolutely comes together, intersect.

And at p. 869 says the ore bodies are shortening and getting continually baser as you come down; the silver values are lowering all the time.

See also answer to Interrogatory No. 8 (p. 65) and his testimony at pp. 551 to 552; 722, 723, 724, 727, 728, 749, 750 751 (530 feet down) 773, 776, 778, 785, 792, 812, 813, 817, 818, 821, 822, 823, and at 841 says they had been "rustling to get ore" for about a year and a half before October 28, 1916 —and at pp. 854 and 855 says there are signs of the supply of ore falling off and that these signs have developed since October 28, 1916; and at p. 869 says, the ores are losing their lead and silver values and getting more iron; and at p. 870 says the situation not as bright as it was on October 28, 1916.

WITNESS ANDERSON(Hercules Engineer, called by Plaintiff) Says the fault on Ex. "B." shows the limits of the ore shoot (1027); that the ore limits on the exhibits "I" and "B" are shorter than the timbering; the ore bodies at No. 5 terminate at the "Fault" which is the eastern boundary of the ore shoots. (pp. 1027-1029-1031);

WITNESS BURBIDGE (Manager Fed. M. & S. Co.) at p. 924, gives these figures from measurement— (stepped it off)—

(Refers to Exhibit No. 54); (Measured at No. 5

Tunnel) east stope (ore shoot) is 150 feet long; middle stope (ore shoot) is 225 feet long; west stope (ore shoot) is 600 feet long;

"East stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut out or merged in this middle stope.

"Middle stope has a length of 225 feet. * * * * The middle stope comes down almost vertically without any particular rake. What it has is slightly to the west. It is quite evident that at some step very little below the 600 level it will merge in the west stope. * * * * And there is very little doubt that the middle stope will also be cut off or merged in the same stope and that below a depth of about 800 feet there will be but the one shoot of ore, the west shoot.

Speaking of the west shoot, he says:

"The length of that stope on the No. 5 tunnel is 600 feet; on the 200 level it is only 500 feet. On the 400 and the 600 it is also—on the 400 it is shorter. On the 600 the drift has not yet reached the end of it but it is so near to it that we are safe in assuming that it will be the same length, 500 feet.

Q. (p. 924) How long will that be approximately, Mr. Burbidge?

A. 500 feet if it maintains its present width.

Same witness at p. 925, says:

Q. What is the width of the ore shoot, the west ore shoot on the No. 6 tunnel?

A. The 600 you mean?

Q. The 600 level.

A. Average about 12 feet.

Q. As compared with the drift of it on the No. 5 tunnel level?

A. 15 feet.

PLAINTIFF'S WITNESS EARL R. GREENOUGH, DISREGARDS PHYSICAL FACTS.

Plaintiff's witness, Earl R. Greenough, was the sole witness who testified on the subject of value, for plaintiff. He makes the following statements:

There are four (4) ore shoots at No. 5 or Humingbird Tunnel as follows: (p. 1084);

East ore shoot No. 2, length	220 feet
East ore shoot No. 1, length	200 feet
Middle ore shoot, length	630 feet
West ore shoot, length	325 feet
Total	1375 feet

He "estimates" that the ore bodies of this length (1375 feet) will go 1500 feet below the creek level (p. 1084).

Q. 1375?

A. If my calculation is correct.

Q. As compared with 500 if my assumptions are correct?

A. I didn't catch that.

Q. Well, your figures are based on 1375 feet of aggregate feet of ore shoots?

A. Yes, that is what I stated in making my estimates, that they are based on the lengths designated on the maps.

His estimated tonnage (pp. 1056 and 1057) is based

upon the following lengths, widths and continuations of four (4) ore shoots which he claims from the "apparent" outlines on the exhibits—not from actual measurements or investigation.

	Length	Width	Area
East ore shoot No. 2	220 ft.	4 ft.	880 sq. ft.
East ore shoot No. 1	200 ft.	4 ft.	800 sq. ft.
Middle ore shoot	630 ft.	15 ft.	9450 sq. ft.
West ore shoot	325 ft.	5 ft.	1625 sq. ft.
Totals	1375 ft. long		12,755 sq. ft.

which he erroneously states at 12,775 sq. ft. (p. 1056).

He says he "ASSUMES" that these lengths (aggregating 1375 ft.) will go to a depth of "1500 feet below Canyon Creek." (p. 1057).

The PHYSICAL FACTS are that the EAST ore shoot has "cut-out;" the WEST ore shoot has shortened by 100 feet at the 200 level below No. 5 or Hummingbird Tunnel; the MIDDLE ore shoot is merging with the WEST, and from all indications will completely merge therewith at the 800 level below the No. 5 Tunnel.

Using his own figures, these facts cut off or eliminate the following lengths from his "ASSUMED" length, to-wit:

East ore shoot ..... 420 feet;
West ore shoot ..... 100 feet; shortened up;
Middle ore shoot ..... 325 feet; merges with large shoot.

845

Leaving, according to his erroneous measurements, an ore length of 1375 feet less 845 feet, or 530 feet from the 800

level down, which, of course, destroys his estimates and shows them to be wholly theoretical.

At pp. 1075 to 1084, he concedes that if the physical facts exist as outlined—and there is no evidence they do not—the estimates would change accordingly, corroborating ours; he also concedes that the "fault" if projected, would cut off certain ore bodies.

SMELTER AND REFINERY.

Because plaintiff placed such emphasis on those two properties, we refer to the testimony which shows that these properties simply took the place of the former ore contract, which the Hercules Mining Company was unable to renew, and were necessarily acquired as direct access to the market, also to remove hazards of ore contracts from time to time, and not for their alleged intrinsic values, otherwise than a vehicle to market the ore without the aid of middlemen, thereby eliminating ore contracts; that in fact they have no other value, and when the mine bottoms, their value is only junk; that in all good mining management they are charged off to loss, and considered as nothing in estimating the assets.

Burbidge, p. 905;

Q. What disposition do you make of the investment in the Northport Smelter and in the Pittsburg Refinery, mining stocks and the mill and the equipment of the property?

A. I made no disposition of them. That is I did not take them into consideration as an asset. They had no realizable value.

Q. Will you tell the Court why, please?

A. Because at the end of the operations of the mine

they will be valueless. Part of the machinery may be sold for ten or fifteen or twenty per cent of its cost, possibly, but that is all that can be sold.

Q. How about the smelter?

A. The same is true of the smelter. The Northport smelter laid idle for—oh, I don't know, ten or twelve years and represented an investment of probably originally half a million dollars, and, as testified here, it was bought for eighty thousand dollars.

Q. What disposition or consideration did you take of those respective mining stocks you saw listed in the interrogatories?

A. I gave them no value.

Q. Tell the Court why, please.

A. Because there is no known value. They are purely speculative. Some of them I believe have been, you might say, the victims of over-development, etc.

The following witnesses testify similarily, and the evidence is not contradicted.

Burbidge, pp. 925-926, and quoes from Hoover's Principles of Mining—pp. 926-927; Mr. Burbidge says: "Mr. Hoover is recognized as one of the bright particular stars of the mining profession." See also p. 1127.

H. L. Day, pp. 992-993, also 978-979.

J. J. Day, pp. 1011, also 1010.

E. R. Day, pp. 767 to 770; 775-781.

WITNESS ALLEN says, p. 602:

"And he—(E. R. Day)—made the remark at that time that he would rather have the ore that was taken out than his interest in the smelter and refinery, because at that

time it was a question whether that was an asset or liabiliay."

EUGENE R. DAY, AS ADMINISTRATOR.

PLAINTIFF'S ALLEGATION NO. 19:

Complaint, Paragraphs 4, 5, 6 and 7, pp. 12 to 23:

Several allegations are made against E. R. Day as administrator of the Estate of Damian Cardoner. It is asserted that Mr. Day bought the estate property of the heir, pending administration; that he did not divulge to the heir, the information which he had of the value of the property, etc.

EVIDENCE:

The facts of alleged concealment and failure to divulge have been set out heretofore.

As to the pendency of the administration at the time of the purchase, the following facts are pertinent:

October 11, 1916—Decree of Final Distribution made and filed in the Probate Court of Shoshone County, Idaho; Mrs. Cardoner was represented by her attorney, John P. Gray, and his assistant Mr. McNaughton; the administrator was represented by his attorney, John H. Wourms;

October 14, 1916—Actual possession of property was delivered to Mrs. Cardoner; the administrator settled with her; she appointed Allen as her agent; and notified E. R. Day and John H. Wourms thereof;

October 14, 1916—Allen, as agent for Mrs. Cardoner, checked E. R. Day's administrator's account (Allen, pp. 595 to 599);

October, 16, 1916—Mrs. Cardoner discussed the sale of her interests with her agent, Allen, for the first time (Allen, pp. 599-600), and asked Allen if he would see what he thought she could get for it; she told Allen she thought Gene Day might buy it (p. 600—bottom).

Thereafter, Allen got Day's receipt (Exhibit No. 13, p. 1185), and discussed the sale with him, (Allen, pp. 602 to 604);

October 21, 1916—Allen saw Mrs. Cardoner and told her what Day had offered, and discussed getting a higher price for her interest, (pp. 604 to 606), and advised her to consult with Paulsen and Hutton, (p. 606);

October 25. 1916—Certified copy of Decree of Distribution recorded with County Recorder;

From October 21 to 27, 1916—Allen saw Mr. Day several times and demanded one-sixteenth of $6,000,000.00 for the Cardoner interest; Day refused to buy the interest for that sum, telling Allen when he made his last offer that he (Day) was through to offer it to someone else.

E. R. Day, pp. 736-737-804;
Allen, pp. 604-605; 610; 616-617;

October 27, 1916—Mrs. Cardoner came to Wallace (Allen, p. 611), and saw her agent, Allen, who told her—"Itold her that I had put the proposition up to Mr. Day on a $6,000,000.00 basis and he 'absolutely refused' to consider it." (p. 616).

Mrs. Cardoner and Allen then fixed the final

price (p. 617), but thereafter, the Burke property was raised $5,000.00 (pp. 618-619) at Mrs. Cardoner's express request (pp. 618-619);

October 28, 1916—Option contract and deed made; payment of $50,000.00 on contract accepted by Mrs. Cardoner. This was to be forfeited in case the purchase was not completed;

October 29, 1916—At the Old National Bank in Spokane, Washington, Mrs. Cardoner paid Allen $5,000.00 as his commission without denying that he was her agent.

Vincent, p. 698-702;

Allen, pp. 662-664;

November 1, 1916—Formal order of discharge of administrator duly entered;

November 14, 1916—Balance of purchase price ($320,000.00) paid.

INNOCENT PURCHASERS.

Harry L. Day and Jerome J. Day assert that they had nothing to do with the transaction until after the deal was closed; that they bought their interest between October 28, 1916, and November 14, 1916, paying in cash therefor. They borrowed the money from the Anglo & London-Paris National Bank of San Francisco, giving a note signed by themselves and E. R. Day, dated November 14, 1916.

Harry L. Day, pp. 963 to 982;

Jerome J. Day, pp. 1003 to 1004.

The reasons Eugene R. Day considered the purchase of the Cardoner minority interests were, to obtain control of the majority interest in the mine, to protect the large interests in

the properties which the Days already owned, to exclude any foreign, adverse interests and to preserve the friendly partnership.

Allen, pp. 604 (top)-610;
E. R. Day, pp. 797 (middle)-809 (middle).

When Harry L. Day and Jerome J. Day agreed to purchase part of the former Cardoner interest from E. R. Day and Eleanor Day Boyce, these same considerations controlled them, as they thought the price too high.

Harry L. Day, pp. 975-976-977;
Jerome J. Day, pp. 1005-1013.

The deeds to both Harry L. Day and Jerome J. Day were dated the —— day of December, 1916, acknowledged by Eleanor Day Boyce, January 5, 1917, and by Edward Boyce, April 5, 1917, and recorded April 9, 1917 (p. 967).

THE COURT'S FINDINGS.

From the decision (pp. 1373-1401), we quote the following:

MRS. CARDONER'S BUSINESS ABILITY.

"The plaintiff was not an ignorant, unsophisticated woman, nor was she without knowledge of the mining business. While her speech is marked by a strong foreign accent, she is not without facility both in using and understanding our language. She has not lived a cloistered life, nor does she give the impression of being by nature abnormally trustful or confiding. She is fairly well educated, to say the least, and has the poise and self-reliance which comes from travel and the rigorous experiences of a pioneer life. In short, I would think that in any ordi-

nary business transaction she could not easily be deceived or overreached. (P. 1382)."

"With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general or about her husband's business or the Hercules mine in particular. (pp. 1386-1387). * * * It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transaction brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required receipts for disbursements, and altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions. (pp. 1387-1388.)"

ALLEN'S AGENCY.

"In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion. I am convinced that he endeavored to get as high a price as possible. (p. 1374.)"

"He made no misrepresentation of facts, and laid

before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interest rather than her's. (p. 1375.)"

"In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scrupulous care. His apparent candor and directeness as a witness left no doubt in my mind of his good faith, and besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge. (pp. 1375-1376.)"

EUGENE R. DAY AS ADMINISTRATOR.

A. October 14, 1916, the estate was duly distributed to Mrs. Cardoner. (p. 1377.);

B. The final decree of distribution was recorded at the office of the County Recorder of Shoshone County, Idaho, October 25, 1916. (p. 1377.);

C. "The order formally closing the estate and discharging Day from further responsibility was not entered until November 1, 1916, but this fact, upon which the plaintiff chiefly relies to support her contention, is thought to be unimportant. (p. 1377.)"

D. "The administration here was technically closed, and Day discharged as administrator, upon November 1st. Thereafter admittedly he had the capacity to purchase, and

from that time on for two months, the plaintiff stood upon the contract of sale. After November 1st she accepted the larger part of the purchase price, and, by such acceptance and her failure to object or protest, approved the transaction and authorized the escrow holder to deliver the deed. Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by counsel in the oral argument at the close of the trial. It would be necessary, therefore, to hold that she acquiesced in and ratified the transaction, even were the view taken that the original agreement was made when Day was under disability to contract by reason of the estate not having been formally closed. * * * I do not hold that the comparatively short delay necessarily constitutes laches or estoppel. But by actively participating in the consummation of the unexecuted agreement, after such disability as Day may have had was removed, she directly confirmed the sale. (pp. 1380-1381.)" and,

E. At pp. 1378-1379, (referring to the actual delivery of the estate on October 14, 1916, after making the final decree of distribution), we find:

"The property distributed is no longer a part of the estate entrusted to the care of the administrator. Touching it, both his rights and his obligations are at an end. * * * In the absence of such petition (petition for partition—meaning) the property not only ceases to be under the control of the administrator, but passes out of the jurisdiction of the court. * * * There is no pretension here that such petition was filed, or, indeed, that it was a case where it could be filed. Hence, when the decree of distribution was entered upon October 14th, not only did

Day lose control of the property, but it passed beyond the jurisdiction of the court."

EUGENE R. DAY AS MANAGER AND CO-OWNER.

At p. 1381, the Court asks this pertinent question:

"Finally, can a reason be found in the fact that Day was, and for a long time had been, the manager of the mine, for holding the sale voidable?"

He then sets forth the limitations of an agent in dealing with his principal's property.

At p. 1382-1383, he reviews Mrs. Cardoner's business ability, residence in Spain, her husband's activities, etc., with which she had a measure of familiarity; the fact that she broke her husband's will; her return from Spain, and at p. 1384, considers her residence in Spokane and the ease of communication between Spokane and Wallace, and says:

"(P. 1384.) Immediately upon arriving at Spokane she communicated by telephone with Day at Wallace, and by appointment visited him there, at the offices of the company, two days later. Upon at least three other occasions prior to the distribution of the estate, twice in August, she conferred with him there. He is insistent that she came to his office and discussed the affairs of the company with him at least a dozen times. But inasmuch as she may have spent several days at Wallace upon a single visit, the apparent conflict in the testimony may be reconciled by assuming that she went to the office more than once during each visit."

"(P. 1385.) In substance her contention is that he made no disclosures at all, but repeatedly put her off, generally with the excuse that he had no time. Upon the other hand, he very positively testifies that again

and again he explained truthfully and in detail the status of the property, and advised her of what has been done and what they were planning and expecting to do. With equal emphasis, too, she makes the specific contention that she did not learn that the company had engaged in the smelting or refining business until she read about it in a mining journal, in November, 1916, after she had gone to New Mexico. Upon this point I am wholly unable to give her testimony credence."

After analyzing the situation, the court says:

"(P. 1386.) But if we put aside these considerations, we find that in the monthly statement of the company for February, 1916, which admittedly she received soon after coming to Spokane, there is shown a large expenditure on account of the smelter. Day testified that at their first conference she told him that her husband had been opposed to going into the smelting business, and questioned him about it. Allen testified that immediately after the decree of distribution, in conversation with him about the mine, she discussed the new smelter and refinery. Paulsen, a disinterested witness, testified that when she called upon him in October, shortly before the sale, and inquired why certain dividends had been passed, he explained 'that the Hercules had gone into the smelter business and branching out, and that they had to build up a reserve to take care of these additional business propositions, and also that we had a large amount of ore in transit to the smelter, which had not then been settled for.' And he also sought to quiet her apparent agitation over a newspaper report to which she directed his attention, to the effect that the "Guggenheims or the Amer-

ican Smelting & Refining Company * * * were going to absorb all of the Day interests in the Coeur d'Alenes, and smelters and everything they had." ' "

At pp. 1386-1387;

"With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general or about her husband's business or the Hercules mine in particular. Admittedly her husband regularly received the monthly statements which the company had long been accustomed t osend to its members, upon which were shown not only the summarized items of operating receipts and disbursements for the month, but the aggregate of all dividends paid during the entire life of the mine. * * * (P. 1387.) according to appointment, she went to Wallace two days later, she answered, 'To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask him for the statements.' "

"(P. 1387.) It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transactions brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required re-

ceipts for disbursements, and altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions."

"(P. 1388.) It is not a case where the principal is at distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments' walk from the offices at Wallace, and the mine a few moments' ride upon the train or by automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question."

The court then discusses her ability to have employed agents; that she did employ attorneys, and says:

"(P. 1389.) For Day to have repeatedly denied her information about the Hercules would have been a flagrant violation of his duty both as manager and as administrator, on account of which the plaintiff might very reasonably, and I think would, have been deeply offended. Yet so far as appears she made no complaint to her friends or to her attorney, nor did she suggest criticism of him as manager to her associate owners, Palusen and Hutton. Instead she seems to have continued to hold him in high esteem, and to entertain for him a friendly feeling, until, after going to New Mexico in December, she was advised by her attorney from the east, (acting in perfect good faith, I doubt not), that upon inquiry he believed that the price she had received was inadequate."

"(P. 1389.) Furthermore, if we credit her story, we must also believe that, without suspicion or resentment against him, notwithstanding the ill treatment which she now charges at his hands, upon five days consideration she sold to Day the very property concerning which he had persistently denied her information, and upon representations chiefly made by Allen, whom she looked upon as Day's agent. However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible."

("P. 1389.) From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it. The mine had been shut down for some length of time in 1915, because of the smelter controversy."

At pp. 1390-1391, the court considers many phases bearing upon the smelter enterprises and at p. 1391, says:

"By her testimony she gives the impression that Allen and Judge Woods and his wife made misrepresentations from which it would follow that the property, if not practically worked out, had only a speculative value, and yet for such a property, Day, its manager, was admittedly making an offer based upon a value of $5,000,000.00, a price in excess of anything ever paid or offered for any interest in the mine before. If, as apparently she would now have us believe, she became panic stricken and by Allen and her other friends was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000.00 from Day, she was overreaching or getting the best of him?"

At pp. 1391-1392, the court discusses various matters re-

lating to alleged misrepresentations to Mrs. Cardoner, and says:

> "(Pp. 1392-1393.) Paulsen, whose intelligence and good faith there is no reason to question, testifies that when she called upon him a few days before the sale, he told her that 'there was a good deal of guess work connected with fixing the price of the mine in the state of development that the mine was in at that time'; that they were behind with their developments, their shaft from the Hummingbird tunnel was not started early enough, and that the ore reserves above the tunnel was getting pretty low, and that at that time they 'did not have such an awful lot of ore exposed or developed.' Indeed no one described the physical condition of the property more conservatively or gave more prominence to the uncertainties involved in making an estimate of the value of the mine than Paulsen, and yet at the same time he told the plaintiff that his interest was not for sale, thereby intending to convey the meaning that he regarded the mine as a good property; and the plaintiff admits that she understood him to advise her to hold on to her interest."

At pp. 1393-1394-1395-1396, the court carefully considers various elements showing the difficulties and uncertainties in fixing values of mining properties, and says:

> "(P. 1396.) So the ultimate question is not what she might have made out of it if she had chosen to retain it, but what it was worth, what it could have been sold for outright. * * * Nor, of course, does the inquiry

here relate to (p. 1397) the amount of ore that subsequent developments may disclose to have actually been in the mine. The mineral content of the mine is a material inquiry only because it is a matter to which both the owner and the prospective purchaser would give consideration. * * * Hence the question is not what the mine actually contained, but what, under the light then available, was a reasonable estimate of its content. Such estimate, of course, is only one of the important factors, and when we consider all of them we find that the margin of uncertainty is so great that any opinion of the value must be measurably speculative."

At pp. 1397-1398, the court considers various questions entering into the ultimate question of reasonable value, and at p. 1399, says:

"Day, though not an expert geologist or mining engineer, and perhaps without experience in marketing mines, was an intelligent, practical operator, with intimate knowledge of the general conditions in and about this property. His judgment is entitled to some weight, and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But be that as it may, whether we

condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000.00 for the assets, exclusive of the cash on hand, and there declined to go further. Through Allen the plaintiff sought to get him to increase his bid, but Day definitely declined, and I think was unwilling to pay more."

"(P. 1400.) His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if for that reason we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses Paulsen and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest seven or eight years before, when undoubtedly the actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000 and in 1906 for $6,000,000. If it be said that to Day the interest had a special value because it gave 'the Days' control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an in-

terest would be less salable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole."

The court concludes:

"(Pp. 1400-1401.) Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

"(P. 1401.) From these considerations it follows that the bill must be dismissed, and such will be the decree."

ERRORS ASSIGNED BY APPELLANT.

At pp. 1403-1410, the appellant specifies ten errors. Briefly, they are as follows:

Error No. I (pp. 1403-1404):

> Involves the reception of option purchase contracts in evidence.

Errors No. II (p. 1405), III (p. 1406), IV (pp. 1406-1407), and V (pp. 1407-1408):

> Are predicated upon the relation existing between Mrs. Cardoner and Eugene R. Day as managing partner and co-owner.
>
> They charge generally that Day was co-owner and general manager of the partnership for

years; Mrs. Cardoner had nothing to do with the management, but was residing in Spain until a few months previous to the sale; that Eugene R. Day was familiar with the partnership business and possessed of and had access to all obtainable information relative to the value of the property; that Day communicated no information to plaintiff with reference thereto; that at the time of the said sale plaintiff did not possess information necessary to form a sound judgment as to its value.

Error No. II says:

A. That the information she had from Day and otherwise was not all the information possessed by him; and,

B. That the price paid for the property did not approximate nearly its real value and was grossly inadequate.

Error No. III charges:

That the consideration given by Day to plaintiff was grossly inadequate and was known so to be by Day and not known to be inadequate by plaintiff.

Error No. IV says:

That the evidence does not show that the price given for the property approximated reasonably near the value thereof.

Error No. V alleges:

That the evidence does not show that all the information in Day's possession which was

necessary to enable Mrs. Cardoner to form a sound judgment of the value of the property was imparted by Day to her prior to the purchase or that at said time she possessed said information.

Errors No. VI. (p. 1408), and VII (pp. 1408-1409):

Assert that Eugene R. Day was administrator, etc., at the time of such purchase and that the purchase of the mining property (Error No. VI) and of the Burke property (Error No. VII) were alike prohibited by Section 5543, R. C. of Idaho.

Error No. VIII (p. 1409):

Challenges the evidence as insufficient to sustain the court's finding that Mrs. Cardoner was informed of the known conditions and facts bearing upon the value of the property at the time of sale.

Error No. IX (p. 1409) says:

The evidence is not sufficient to show that the price Eugene R. Day paid for plaintiff's interest in the mining company's property approximated the reasonable market value thereof.

Error No. X. (p. 1409):

Assails the entire transaction and asserts that fiduciary relations existed between Day and Mrs. Cardoner; and that Day did not impart to her information possessed by him from which she could have judged approximately

near the value; and that Jerome J. Day, Harry L. Day and Eleanor Day Boyce were not innocent purchasers.

It will be noticed that appellant does not challenge the findings of the court on the following questions:

A. Mrs. Cardoner's business ability, aptitude and experience;

B. That she recited her family troubles to Day and Allen;

C. That Allen was Mrs. Cardoner's agent;

D. That he made no misrepresentations to her; that Allen never acted for any of the Days nor in conjunction with them;

E. That the price paid for the Burke property was in excess of its value; and

F. That her estimated one-sixteenth of the cash on hand was in excess of the true amount.

POINTS AND AUTHORITIES.

POINT I.

Findings which are unchallenged on appeal are conclusive.

Rule 11—this court.

3 Corpus Juris, p. 1330, text and note 44, (cases).

3 Corpus Juris, p. 1333, Section 1463.

Wallace Wood, Jr., Trustee v. Lumber Co., 226 U. S. 384; 33 S. C. 125 (syllabus, Par. 1).

Briscoe v. Rudolph, 221 U.S. 547; 55 L. 848 (850).

See argument—post, pp. 82-83

POINT II.

Binding, concluded option purchase contracts, voluntarily

made are admissible as evidence tending to show the value of the property involved. They differ from mere unaccepted offers to sell.

Fenerstein v. The U. S. ("Fenerstein's Champagne"), 3 Wall. 145; 18 L. 121.

Virginia v. West Virginia, 238 U. S. 202; 35 S. C. 795 (800), (the options were received in evidence. We are now concerned simply with their weight.)

15 Cyc. 304.

16 Cyc. 1135 (1136, text and note 64).

McLean v. Clark, 47 Ga. 24.

Gatling v. Newell, 9 Ind. 572.

G. H. & S. A. R. R. Co. v. Davis, White & Wilson's Repts. (Tex. C't. Ap.) Vol 1, Sec. 147, bot. page 58.

Thurber v. Thompson, 21 Hun. 472.

Moore v. Devoe, 22 Hun. 208.

Rawson v. Prior, 57 Vt. 612.

Hotchkiss v. Germania Fire Ins. Co., 5 Hun. 90.

Harrison v. Glover, 72 N. Y., 451.

Cliquot's Champagne, 3 Wall. 143.

Geohegan v. R. Co., 266 Ill. 482; 107 N. E. 786.

Park Dist. v. Hedenberg, 267 Ill., 588; 108 N. E. 664.

Sanitary Dist. v. Baumbach, 270 Ill., 128; 110 N. E. 331.

Germ. Am. St. Bank v. Spk-Col. R. R. & N. Co., 49 Wash. 359; 95 Pac. 261;

Rottleberger v. Henley, 155 Iowa, 638; 136 N. W. 776.

Faust v. Hosford, 119 Iowa, 97; 93 N. W. 58.

Clausen v. Tjernagel, 91 Iowa, 285; 59 N. W. 277.
N. A. Tel. Co. v. N. P. Ry. Co., 254 Fed. 417 (418).
Joy v. Ins. Co., 83 Iowa 12; 48 N. W. 1049.
See argument post, pp. 78. to 80.

POINT III.

A transaction cannot be assailed on the ground of breach of alleged fiduciary relations where the complaining party conducted an independent investigation, acted through her own agent, consulted her friends and did not rely upon the fiduciary to furnish information.

Colton v. Stanford, (Cal.) 23 Pac. 16, (pp. 21-22).
Curran v. Smith, 149 Fed. 945 (3rd C. C. A.) affg. 138 Fed. 150 (156-158).
Pittsburg L. & L. Co., v. Northern C. L. Ins. Co., 140 Fed. 888 (893—bottom), (cases collated).
Palmer v. Shields, 128 Pac. 1051.
Blank v. Connor, (Cal.) 141 Pac. 217, (p. 220, last paragraph).
Kinne v. Webb, 54 Fed. 34 (Point II, p. 39) (8th C. C. A.).
Littell v. Hackley, 126 Fed. 309, (6th C. C. A.)

Likewise, where concealment is the ground of action, it must appear that plaintiff relied upon defendant to make disclosure of the fact concealed, and that the concealment was a moving inducement to the plaintiff's change of position.

The concealment, misrepresentation or non-disclosure must be intentional.

14 Am. & Eng. Ency. of Law, Second Edition, p. 69.
Colton v. Stanford, 23 Pac. 16 (syllabus Point I).

In such a case the question is, "what did the trustee con-

ceal," and not "what would a search by him have disclosed." The trustee is not compelled to search for facts which he does not know, nor to express his opinion; his duty is discharged when he gives the information which he has.

Richardson v. Heney, 157 Pac. 980.

Even where the relation is trustee and beneficiary reliance must be alleged and shown.

Burke v. McGuire, 98 Pac. 21 (25), (right hand column at bottom), and on rehearing, p. 26.

See argument post, pp. 80. to 115.

POINT IV.

The trust relationship between administrator and heir is fully terminated when the final account has been approved, the decree of final distribution made and entered in the Probate Proceedings, possession of the trust estate delivered to the heir and certified copy of the decree of final distribution is recorded in the Recorder's office.

Wheeler v. Bolton, 54 Cal. 302.

Norfew v. San Francisco & S. R. R., 44 Pac. 810 (812-813).

Moore v. Lauff, (Cal.) 158 Pac. 557 (559).

Buikley v. Superior Court, (Cal.) 36 Pac. 360.

See argument post, pp. 143. to 147.

POINT. V.

The rule prohibiting an executor from purchasing property of the estate at a sale made by such executor, does not prevent the executor from purchasing the estate by direct dealing with the heir after the decree of final distribution has been recorded. Unless it shall appear from the evidence that the executor did not make full disclosure to the seller and did

not pay a consideration approximating a fair price for the property.

R. C. Idaho 5543.

Werner's American Law of Administration, 2nd Ed., Vol. 2, Sec. 487, pp. 1085-1086.

State v. Jones, 131 Mo. (S. C. 33 S. W. 23).

Vol. I, Perry on Trusts, 6th Ed. Sec. 205.

Vol. I, Black on Recission & Cancellation, p. 114, Sec. 46.

Mills v. Mills, 57 Fed. 873 (878-879—per Gilbert, Circuit Judge).

Golson, et ali, v. Dunlap, (Cal.) 14 Pac. 576 (578-579).

Haight v. Pearson, (Utah) 39 Pac. 576.

French v. Phelps, (Cal.) 128 Pac. 772.

Littell v. Hackley, 126 Fed. 309 (6th C. C. A.).

Kinne v. Webb, 54 Fed. 39 (8th C. C. A.).

See argument post, pp. 142 to 147

POINT VI.

Parties who deal with and calculate the chances of value of property of speculative and doubtful value, are bound by their transactions unless there is an element of misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud.

Colton v. Stanford, 23 Pac. 16 (24-25).

Pomeroy's Equity, 4th Ed., Vol. 2, Sec. 855, pp. 1745-1746.

Tabor v. Piedmont Heights Bldg. Co., 143 Pac. 319-320.

Cleveland Cliffs Iron Co., v. East Itasca Mining Co., (8th C. C. A.) 146 Fed. 232 (syllabus Point

4) (p. 236 et seq.), quoting from U. S. v. Barlow, 137 U. S. 271 (281); 10 Sup. Ct. 77; 33 L. 346, and collating authorities.

See argument post, pp. 80 to 117.

POINT VII.

Mining properties are necessarily of speculative value, and transactions concerning them cannot be set aside for inadequancy of consideration where the price paid is a fair approximation to its value rather than the full value of such property.

Brooks v. Martin, 2 Wall. 73.

Patrick v. Bowman, 149 U. S. 44.

Richardson v. Heney, (Ariz.) 157 Pac. 980.

Colton v. Stanford, 23 Pac. 16 (24-25).

The laws of the mining states almost unanimously recognize the difficulty of ascertaining the value of mining property, and provide, therefore, for taxing the actual output of the mines, rather than to undertake to ascertain the value and assess the property upon the value thereof.

Foster v. Hart Cons. Mining Co., 122 Pac. 48 (50).

Reding & P. R. R. Co. v. Balthazar, 13 Atl. Reports, 294 (297).

Southern Development Company v. Silva 125 U. S. 247; 31 L. 678; 8 S. C. 883.

Gordon v. Butler, 105 U. S. 553; 26 L. 1166.

Biwabek Mng. Co. v. U. S. 242 Fed. 9 (16).

Doyle, Internal Revenue Collector v. Mitchell Bros., 235 Fed. 686 (691).

Fred Von Baumach, Collector of Internal Revenue, v. Sargent Land Company, 242 U. S. 503; 37 S. C. 201 (208).

Hodgins vs O'Connor 191 U. S. 237-246

Handley v. Federal Mng. & Smltg. Co., 235 Fed. 769 (771-773-774-777).

See argument post, pp. 117. to. 118.

ARGUMENT.

Considering the several errors assigned, these appellees contend:

ERROR No. 1 (pp. 1403-1404).

At the trial, while Witness Eugene R. Day was testifying on direct examination (pp. 756-758), and over the objection of the plaintiff (pp. 757-758), the witness testified that in 1905, the Days, Mr. Cardoner and Mr. Rothrock gave an option purchase contract to Mr. Adams of all their interests, basis $4,000,000.00; and also that in 1906, the entire mine was optioned to J. P. Graves for $6,000,000.00, and witness Folsom (pp. 885-890) gave like testimony to which no objection was made.

The Adams option contract is Exhibit 52, pages 1312-1319.

J. P. Graves paid $20,000.00 (p. 888), and John B. Adams paid $625.00, as part purchase price (p. 1314), and, thereafter each dropped his respective option.

This evidence was admissible to show the reasonable, probable value of the mine as the contracts there referred to were not mere offers to sell, but were concluded agreements binding the owners to sell and the purchaser to buy at the price named, subject only to the will of the purchasers.

This evidence was received and the sole question for consideration is its weight and not its admissibility.

In Virginia v. West Virginia, 238 U. S. 203, 35 S. C. 795 (800), certan newspaper quotations of the value of stocks

in the early sixties were received in evidence. The court says:

"The quotations referred to appeared in the 'Richmond Dispatch,' a newspaper of high reputation, and embraced reports of sales by brokers of good standing. It is unquestioned that, in proving the fact of market value accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence. Cliquot's Champagne, 3 Wall, 114, 141, 18 L. ed. 116, 120; Fennerstein's Champagne (Fennerstein v. United States) 3 Wall. 145, 18 L. ed. 121; Chaffee v. United States, 18 Wall. 516, 542, 21 L. ed. 908, 912; Sisson v. Cleveland & T. R. Co., 14 Mich. 489, 90 Am. Dec. 252; Cleveland & T. R. Co. v. Perkins, 17 Mich. 296; Whitney v Thacher, 117 Mass. 523; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522; State ex rel. Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922, 929; Nash v. Classen, 163 Ill. 409, 45 N. E. 276; Washington Ice Co. v. Webster, 68 Me. 449; Harrison v. Glover, 72 N. Y. 451. We need not stop to review the decisions that are cited with respect to the extent of the preliminary showing of authenticity that is required (Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Norfolk & W. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522) inasmuch as all the quotations asserted to have any bearing were received in evidence by the master. We are now simply concerned with the question of their importance or weight, and whether they can be deemed to have the controlling effect that is sought to be ascribed to them."

N. A. Tel. Co. v. N. P. R. Co., 254 Fed. 417 (418 says:

> "To prove market value when it is used in this secondary or figurative sense, it is proper to receive evidence of individual transactions, even offers made in good faith for property of like character, the nature of the property, its location, its rental value, the uses to which it can be put, and all the manifold elements which are admissible to show the far and reasonable value of property which is not so traded in as to give it a market value in the primary sense of the term."

In over-ruling plaintiff's objection to these options when offered as evidence, Judge Dietrich said:

> "(P. 758.) THE COURT. The objection will be overruled. While for some purposes an option is not receivable, of course in evidence, it is indicative of the estimate in which the owners of the property held it. It is like an offer to sell. That would indicate the attitude of the owner of the property."

Upon the above authorities as well as those cited under Point 11, this brief, we submit that no error was committeed in the reception of this evidence, as on the question of good faith, the options show that Day paid Mrs. Cardoner more for her one-sixteenth interest than the co-owners had asked for their interests when the mine was from 10 to 12 years younger than at the date of the transaction in question.

ERRORS No. II (p. 1405), III (p. 1406), IV (pp. 1406-1407), V (pp. 1407-1408) and X (p. 1409).

These various errors will be considered together as they

all relate to the same matters. They charge generally as follows:

That Day was co-owner and general manager of the partnership for years; Mrs. Cardoner had nothing to do with the management, but resided in Spain until within a few months of the sale; Day was familiar with the partnership business and possessed of and had access to all obtainable information relative to the value of the property; that Day communicated no information to plaintiff with reference thereto; that at the time of said sale plaintiff did not possess the necessary information to form a sound judgment as to the value of the property;

Error II says that the information she had from Day and otherwise was not all the information possessed by him;

Error V says that the evidence does not show that all the information in Day's possession, which was necessary to enable Mrs. Cardoner to form a sound judgment of the value of the property, was imparted by Day to her prior to the purchase or that at said time she possessed said information;

Error X says that Day did not impart to her information possessed by him from which she could have judged approximately near the value of the properties;

Errors II, III and IV charge that the consideration was grossly inadequate; was known to Day to be inadequate; that Mrs. Cardoner did not know its inadequacy; and the evidence fails to show that the price given for the property approximated reasonably near its value.

In considering the matters embraced within these errors we believe the court should keep in view the false charges in the complaint respecting Harry R. Allen, all of which

were resolved against Mrs. Cardoner; that appellant has not assigned a single error respecting any matter wherein Allen was involved by such charges; and to remember the assault upon, and false allegations concerning him, found at Paragraphs V and VI, pp. 13-20 of the complaint.

We bring these matters to the court's attention here and now to demonstrate Mrs. Cardoner's mental attitude and the reckless manner in which she accused various persons of wrongs of which they were innocent; and also to emphasize her aptitude for error and misstatement.

She described herself as an unsophisticated, ignorant woman, unskilled in business or the ways of the world, and incompetent to look after her own affairs.

FINDINGS UNCHALLENGED.

Among the very material facts found by the court which are not challenged on the appeal are the following:

A. Mrs. Cardoner's business ability, alertness, education, aptitude and experience; her willful misrepresentation that Allen was Day's agent; and that she knew nothing of her husband's affairs; her adroitness and evasiveness as a witness and her alacrity and unnecessary frequency in attempting to create the impression that she knew nothing of business customs in general or the Hercules mine in particular;

B. Her repeated visits and consultations with her own friends and other co-owners besides Day, and her agent, Mr. Allen, during this transaction, and her attorney, Mr. Gray, during the administration;

C. That Allen was her agent and not the agent of the Days; that he made no misrepresentations to her; but acted in good faith toward her; that he was not incited by the

Days, and did not act in collusion with them; that he obtained the highest possible price, and used utmost good faith in her business transactions;

D. That Mrs. Cardoner was not in an agitated state of mind because of any false representations by Allen or other persons; that she had troubles with her family in Spain.

We ask that these rules of law be kept in mind,

FIRST. Findings which are unchallenged are conclusive.

> Rule 11—this Court.
>
> 3 Corpus Juris, p. 1330, text and note 44 (cases).
>
> 3 Corpus Juris, p. 1333, Section 1463.
>
> Wallace Wood, Jr., Trustee v. Lumber Co., 226 U. S. 384; 38 S. C. 125 (syllabus, Par. I).
>
> Briscoe v. Rudolph, 221 U. S. 547; 55 L. 848 (850);

SECOND, "A finding of fact made by the trial court on conflicting evidence is presumptively correct and will not be disturbed in the absence of serious mistake in the consideration of the evidence or error in the application of the law."

> G. N. Ry. Co. v. Pa. & R. C. & I. Co., 242 Fed. 799 (syllabus Point 2).

We have heretofore shown the testimony of Mr. Day relative to the numerous conversations which he had with Mrs. Cardoner from April 19, 1916, to the time he delivered actual possession of the estate to her on October 14, 1916. See Statement of Facts, subject, Confidential Relations, Paragraphs Nos. III, XII and XIII.

At pp. 1384-1385, the court says:

"Unfortunately upon the important question of what information relative to the mine Day gave her, the direct evidence, consisting almost exclusively of the testimony of the two parties most concerned, is highly conflicting. In substance her contention is that he made no disclosures at all, but repeatedly put her off, generally with the excuse that he had no time. Upon the other hand, he very positively testifies that again and again he explained truthfully and in detail the status of the property, and advised her of what had been done and what they were planning and expecting to do. With equal emphasis, too, she makes the specific contention that she did not learn the company had engaged in the smelting or refining business until she read about it in a mining journal, in November, 1916, after she had gone to New Mexico. Upon this point I am wholly unable to give her testimony credence."

At pp. 1385-1389, the court discusses various facts, and at p. 1389, says:

"However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible. From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it."

At pp. 1390-1391, the court continues the discussion, and at p. 1391, says:

"If, as apparently she would now have us believe, she became panic stricken and by Allen and her other friends

was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000.00 from Day, she was overreaching or getting the best of him?"

At pp. 1391-1393, the court continues his discussion of the testimony, and at pp. 1392-1393, says:

"Indeed no one described the physical condition of the property more conservatively or gave more prominence to the uncertainties involved in making an estimate of the value of the mine than Paulsen, and yet at the same time he told the plaintiff that his interest was not for sale, thereby intending to convey the meaning that he regarded the mine as a good property; and the plaintiff admits that she understood him to advise her to hold on to her interest."

At pp. 1393-1396, further facts are considered by the court, and at pp. 1395-1396, we find:

"Besides—and I think this consideration had much weight with her, regardless of its merit or want of merit in point of law—she was not without fear that the legatees named in her husband's will would seek to assert rights thereunder, and she reasoned that such a contingency was much less likely to happen or to turn out adversely to her if she disposed of all her interest in the specific property of the estate. Upon the whole, I do not think it can be held that under the known conditions her decision to make a sale was precipitous or improvident."

At pp. 1396-1401, the court carefully considers the question of value, and at pp. 1400-1401, says:

"Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source and in my view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

In appellant's brief, pp. 29-64, an attempt is made to set out the testimony of Eugene R. Day in narrative form. The argument is made that Mr. Day did not divulge all the information he had about the mine to Mrs. Cardoner.

Appellant fails to give due consideration to the following testimony:

WITNESS EUGENE R. DAY, pp. 726-727:

"Q. Well, what did she say as to that, as a business proposition, if anything?

A. Well, she didn't think that it was good business to tie up so much money, and so much ore in the business, in the smelting business, and she was quite doubtful about it. But I assured her that the business of the partnership was never healthier than it was at that time.

Q. Was there anything said about the condition of the mine, the future life of the mine below the Hummingbird tunnel?

A. She asked me my opinion, and I told her that if we had always had good ore all the way down, that the history of the country showed that the ore became

baser, but I had every reason to believe that large bodies of ore would be discovered in new development.

Q. What development was that, Mr. Day?

A. The development by the shaft, and below the No. 5 level of the Hercules property.

Q. Below the No. 5 tunnel?

A. Below the No. 5 tunnel.

Q. Was there any statement made in reference as to how deep it might go?

A. Yes, that was talked over.

Q. What was it?

A. She asked me how deep that I supposed it would go, and I told her no one knew that; that the best opinion we could have would be proved by the example of others who mined in the district close to that particular place.

Q. Well, did you go into the history of those in any way?

A. Well, I recited further my idea in the matter, and I told her it was my opinion at that time that the Tiger did not pay lower than the fifteen or eighteen hundred feet below the creek level."

And after detailing the work which had been done below the Hummingbird tunnel and his informing her thereof, he says:

"(P. 752). Q. What information did you have relative to the development of the Hercules mine below the Hummingbird tunnel that you did not impart to Mrs. Cardoner?

A. I gave Mrs. Cardoner a full account of all the operations that were going on.

* * *

Q. Did you at any of these conversations conceal from Mrs. Cardoner any information relative to this development work that I have asked you about?

* * *

A. No, I never concleaed anything from Mrs. Cardoner pertaining to that business.

* * *

Q. Did you misrepresent any facts relative to the Hercules property, the Hercules mine, or its development, to Mrs. Cardoner?

A. No, I did not."

"(P. 776.) Q. Tell us what you said?

A. I told her that we had encountered good ore in the 200 level in the August conversation, that the ore was not explored enough to tell how much was there, but it looked good."

"(P. 782.) Q. All right. What other questions did she ask in the spring conversation?

A. She asked the same subject matter in each conversation in substance.

Q. I understand that, but what did she ask?

A. She asked to be told all about the business, the refinery and the smelter, the ore in transit—

Q. She mentioned all of those things in her questions, did she?

A. She absolutely did.

Q. Did she frame one general question, such as you stated now?

A. Well, she didn't frame anything. It all took place in a conversation, a friendly conversation between Mrs. Cardoner and myself, and I don't think there was any framing."

WITNESS PAULSEN, at pp. 683-684-685-686:

Paulsen testifies to a conversation with Mrs. Cardoner about the Guggenheim rumor which he didn't believe, and says:

"A. * * * I told her I had seen the same article in the paper that she had evidently, and for her to disregard it, and that there was nothing to it. I told her that I did not believe the Guggenheims were after us, and that if they were, we were able to take care of ourselves against them, we were in good shape to do our business, and that they could not bother us any.

Q. Who did you refer to as 'we,' Mr. Paulsen?

A. Why, the partnership of the Hercules mine."

"(P. 684.) A. * * * And she asked me what I thought about her selling her interest to him, and I told her I didn't want to advise her because if I advised her to sell I might make a mistake, and if I advised her to keep it I might make a mistake, so I told her I thought my judgment would not be worth very much to her. I did not like to advise her. However, I said, my interest is not for sale, and that is about all that was said."

(P. 685.) He explained to her about there being no dividends for a few months, the building of the cash reserve, and also the ore in transit, etc.

"(P. 686.) A. * * * I told Mrs. Cardoner

very plain, that after I told her my interest was not for sale, I told her, 'But if you sell your interest, Mrs. Cardoner, you will have all the money you want, and you will have the same thing if you keep it.' "

"(P. 687.) Q. When you told her your interest was not for sale, what did you mean by that?

A. Well, I meant, that she might take a hint that it was a good thing, for her to keep her's."

WITNESS MRS. CARDONER, at pp. 355 et seq:

"Q. Will you tell us what you did, if anything, for the purpose of trying to get some information about it?

A. I went to Mr. Paulsen, the day after.

Q. Mr. Paulsen?

A. Yes.

* * *

Q. What did you say to him?

A. I asked him if that was true, that the Guggenheims want to buy that mine, and he said he don't think so, he think there is nothing in that."

"(Pp. 399 et seq.) Q. Mrs. Cardoner, you say that after Mr. Allen talked to you on that day you went to see Mr. Paulsen, the next day?

A. The next day, yes.

Q. Now, as nearly as you can recollect, please tell the court the substance of your conversation with Mr. Paulsen?

A. Oh, it wasn't much of a conversation.

Q. Did you talk about the Hercules mine?

A. Yes, I say a few—(p. 400)

Q. Did he talk about the Hercules mine?

A. Yes, I say a few—'Do you think the Guggenheims want to buy that mine?' And he say, 'I don't think so.'"

Q. What is that now?

A. He said he didn't think so.

Q. Who didn't want to buy it, the Guggenheims?

A. Yes, the Gugghenheims.

Q. Did you ask him how much the property was worth?

A. I didn't ask him how much the property was worth because I didn't sell the property.

Q. Did you ask his advice as to whether you should sell it?

A. I don't remember.

Q. What?

A. I don't remember. He said he would not sell it if it was him.

Q. He would not sell it if it was him?

A. Yes.

Q. He told you that, did he?

A. Yes. And when I went in Wallace, it was with the intention of not to sell.

Q. Mr. Paulsen told you he would not sell it, did he, if it was you?

A. No, if it was himself he would not sell it. He talked about him.

WITNESS HARRY ALLEN, at p. 600:

"Q. What did you discuss in addition to that on the trip to Spokane on the train?

A. We discussed her different interests, particularly the interest in the Hercules.

Q. What was said with reference to that?

A. She said that she was—first she said she wondered what she could get for her Hercules interest, and I told her then, said, 'You don't want to sell that interest, Mrs. Cardoner.' Well, she apparently was afraid that her son-in-law would come over here, etc."

"(P. 615-616). Q. Mr. Allen, was that the conversation at which you advised her to go and talk with Mr. Hutton and Mr. Paulsen, and her lawyer?

A. Yes, sir. I don't know whether I have testified to this or not, but either at that time or later on I asked her if it would not be a good idea for her to sell her share and leave Bertha's intact."

WITNESS HUTTON, at pp. 672-673:

Testifies to a conversation had with Mrs. Cardoner about six weeks before the sale.

"(P. 672.) Q. What was the conversation with reference to that?

A. She speaks in broken English, and I cannot understand her very well, but something was said in regard to the value of the property.

Q. Yes, who said it?

A. She spoke of the value, what I thought the value of it was.

Q. Yes.

A. And I told her that, taking everything into consideration, the depth of the mine, and all the equipment she had, smelting and concentrators, that I considered $4,000,000 was a good price for it.

Q. Mr. Hutton, did she ask you any reasons for your conclusions, or did you give her any?

A. Why, no, I don't remember of giving her any reasons more than this, that the mine was getting deep, and that we knew of some six mines within two or three miles of there that had played out, from 1800 to 2400 feet in depth, things like that, taken into consideration."

WITNESS MRS. CARDONER, at pp. 403-404:

Says she saw Mr. Hutton in April 1916, in his office.

"(P. 404.) Q. Did you discuss with him at that time the value of the Hercules mine?

A. No.

Q. Or of your interest in it?

A. No, he asked me, 'You are not going to sell?' and I say, 'Oh, no, I don't want to sell.'

Q. Mr. Hutton asked you if you wanted to sell?

A. Yes.

Q. That is when you first came back from Spain?

A. When I first came; and I say, 'No, I don't want to sell.'

Q. Was there any other discussion at that time?

A. No.

Q. Did you ask him what he thought the mine was worth at that time?

A. I didn't ask him that time. I never want to sell the mine. I didn't ask him how much it was worth. I wasn't in position to sell. All what I want to know is about my dividends, the dividends Mr. Day never sent me after I was there.

Q. You asked him, did you, about the dividends that it was paying at that time?

A. Mr. Day, yes.

Q. No, not Mr. Day, Mr. Hutton?

A. No, there was no discussion about that with Mr. Hutton.

Q. Did you say Mr. Hutton asked you if you wanted to sell your mine?

A. No, he says, 'You are not going to sell?' and I say, 'No, I ain't going to sell.' That is all.

She denies any discussion with him about October, 1916, but at pp. 406-407, after referring to her diary, she admits she saw Hutton on May 28, and again on October 29, 1916.

At pp. 408-409, she admits she wanted to see Mr. Hutton to learn what he would say about the mine.

We have heretofore shown that on October 14, 1916, after the property was turned over to Mrs. Cardoner, she notified Eugene R. Day and John H. Wourms that Allen would represent her, etc. Wourms, at pp. 957-960.

Allen's testimony, at pp. 610-622, is a complete recital of the transaction of sale showing her acquaintanceship with the various properties, her reasons for selling, his course of negotiations with Eugene R. Day, and Mrs. Cardoner's acquaintanceship with it, and that she fixed her own price after Day had refused to pay $6,000,000.00 and told them to sell elsewhere.

The above evidence conclusively establishes:

A. That Day gave Mrs. Cardoner all the information he had and concealed nothing from her;

B. That she employed her own agent and notified Day

thereof, and did not rely upon Day after October 14, 1916; and

C. That she made up her mind to sell and was not influenced by anyone in so doing, and employed her own agent and conducted her own investigations as to price, terms and conditions of sale.

NET PROFITS AND DIVIDENDS.

Appellant's brief, at pp. 45-52, says that Mrs. Cardoner never knew the difference between the net profits and the dividends; and charges are made that Eugene R. Day suppressed such information, and that had she been informed that a difference existed in these two items, she would not have made the sale. At p. 51, counsel says:

> "It is quite evident that he did not desire her to have the necessary information, etc."

And at pp. 45-48, much time is spent in calculations to show that this difference exists.

Counsel overlooks the following testimony from plaintiff's agent, Harry R. Allen, (pp. 610-612), which Mrs. Cardoner never denied. After reciting the conversation with Mr. Day, witness says (p. 611), that in his talk with Mrs. Cardoner, the conversation came up (p. 612):

> "A. The way the discussion came up, Mrs. Cardoner wanted to sell her interest, and it was a question of getting a fair value, a fair price for it, and she seemed worried * * * She seemed worried about what her daughter would think of it, and she said, 'What excuse will I give Bertha?' And then this discussion came up about the probabilities of no more ore being found there. I think I told her that mining engineers in examining a

mine would allow so much below what they could see. And the Hercules had been worked for approximately 12 years—or 16 years, and had paid something over nine million dollars in dividends, and had accumulated assets that would bring it up to about in round number eleven million dollars that it had paid in that length of time.

Q. Where did you get those figures?

A. Why, I got them off of her statements. ?

Q. Pointed them out to her at that time?

A. Sure, I put them down on a piece of paper at that time, figured them out.

Q. All right.

A. This was all roughly, you understand, etc."

And again at pp. 643 and 644, Witness Allen on cross-examination, says:

"Q. Didn't you say on your direct examination that you pointed out to her something about, something was said about the Northport smelter and the Pennylvania smelter?

A. As I recall it, I listed those items together with the assets of the company. I think I analyzed the statement of March 31st, if I am not mistaken. I think that is one of the statements that I had, and I just took the profit and loss account and deducted the dividends,—I had listed the other items—deducted the dividends and the balance showed the profits that the concern had made that was unpaid in dividends, and I figured it amounted to about eleven million dollars. I think that is the way I arrived at that amount."

Witness then identifies the March, 1916, statement as the one he used, and at pp. 644, 645 and 646, shows that the items of the Northport Smelter and Pennsylvania Refinery are on that statement.

By reference to the March, 1916, statement (Exhibit No. 21, p. 1209), Allen's testimony is corroborated.

That statement shows these items:

Loss and Gain (p. 1217)	$11,023,642.38
Dividends (P. 1214)	9,107,527.72
Difference	$ 1,916,114.66

This is the difference between profits and dividends aggregating approximately $2,000,000.00, of which Allen informed Mrs. Cardoner.

The specific items making up this difference are set out at pp. 1214, 1215, 1216, and 1217, in the trial balance.

Mrs. Cardoner was informed of this difference and of these items, by her own agent, and counsel's argument to the contrary is contrary to the record.

This March, 1916, statement is one which Mrs. Cardoner gave to Mr. Allen.

WITNESS PAULSEN, at p. 685, says:

"A. Oh, yes, Mrs. Cardoner made a remark about no dividends having been paid for two months prior to that time. The custom was ordinarily to pay dividends about the first of the month, and there had been none paid on the first of September or the first of October of that year. And she asked—I don't remember that she asked, but she mentioned the fact that no dividends had been paid for the last few months, and wondered what

their reason for it was. I made the reply that the Hercules had gone into the smelter business and branching out, and that they had to build up a reserve to take care of these additional business propositions, and also that we had a large amount of ore in transit, to the smelters, which had not been settled for, and that the company did not have such a big surplus on hand at the time, and that is about all the explanation I made to her."

P. 48, appellant's brief, says:

"It will be seen from the answer to interrogatory 14 that appears at pp. 72-77 of the record that the dividends declared approximated the net earnings each year up until the year 1915, the very year that Madam Cardoner became possessed of the property, and in 1915 the dividends were less than one-third of the net profits, and in 1916 they were a million dollars less than the net profits up to the date of sale."

Appellant's brief, p. 46, says:

"The plaintiff had a right to believe, unless otherwise informed, that the dividends would approximate the earnings of the mine, inasmuch as the dividends apparently were paid monthly. * * * these are the only two years that her husband had not managed the mining interests, as he died in July, 1915."

This argument is false and misleading. Mr. Cardoner never managed any part of the Hercules mine; and the argument throughout the brief that the dividends were suppressed after Mr. Cardoner's death is equaly false. The dividends and profits never were co-equal. The following table, compiled

from Eugene R. Day's answers to interrogatories, demonstrates this fact:

YEAR	NET SMELTER RETURNS	NET PROFITS	DIVIDENDS	BALANCES
	$	$	$	$
1901	27,810.77	20,567.72	8,000.00	12,567.72
1902	266,785.42	169,527.03	94,200.00	87,894.75
1903	667,616.58	438,746.27	257,800.00	168,066.02
1904	731,107.59	439,418.89	544,000.00	46,761.57
1905	725,218.80	375,348.90	626,300.00	196,700.47
1906	1,272,000.41	787,534.19	880,000.00	126,240.01
1907	1,296,328.64	765,160.89	800,000.00	91,400.90
1908	907,071.43	383,751.89	448,000.00	27,152.79
1909	789,245.88	325,305.35	352,000.00	458.14
1910	874,955.04	418,542.00	384,000.00	35,000.14
1911	1,148,574.25	544,429.34	329,227.72	250,201.76
1912	1,415,462.29	715,763.33	704,000.00	261,965.09
1913	2,055,633.60	1,207,326.86	1,124,000.00	445,291.95
1914	2,991,148.64	1,868,761.81	2,176,000.00	138,053.76
1915	2,103,955.79	1,096,019.37	320,000.00	703,219.75
1916	3,690,703.74	2,368,682.90	1,432,000.00	1,448,785.94
Total	$20,963,618.87	$11,915,886.74	$10,379,527.72	

It is thus seen that each year from 1901 the dividends and net profits never were co-equal, and the argument of the counsel, pp. 45, 46 and 47, is directly contrary to the record.

The constant repetition of this argument illustrates the extremity to which counsel are driven in this case.

At pp. 45 to 48, appellant argues:

"During the year of 1915 the net profit of the company was $1,096,019.37, and the dividends were $320,000, making a difference between the net income and dividends paid $776,019.37."

And again at p. 46:

"But the testimony of Eugene R. Day as reflected by his answer to interrogatory No. 14 (Tr. p. 77) shows that up to and including the 28th day of October, 1916, the net profit for the ten months of said year was $2,368,682.90, or approximately a difference of $1,000,000.00 between the net income and the dividends during said period."

Referring to the table last above set out, the balance up to October 28, 1916 was $1,448,785.94.

From the statements rendered, this balance is made up as follows:

Accounts Receivable	$ 29,400.67
Ore in Transit	1,048,864.14
Cash	649,359.48
Total	$1,727,624.29
Deduct the amount due smelter	278,838.35
Balance	$1,448,785.94

Counsel's misconception of the financial conditions of the Hercules Mining Company as shown in the statements, arises from his failure to appreciate the trial balance which is a part of each monthly statement.

At pages 45 et seq., appellant's brief pays marked attention to the September, 1916, statement. But, as we read that statement it shows:

Net income from all sources in cash since beginning operations $12,019,128.04

From which there has been distributed in dividends $10,379,527.72

The balance is represented by the following assets:

Bills receivable	$ 56,589.65	
Northport smelter	241,789.70	
Pennsylvania refinery	87,500.00	
Republic mines	46,500.00	
Plant and equipment	407,956.03	
Power line	26,180.39	
Other investments	346,091.73	
Cash on hand	426,992.82	1,639,600.32
		$12,019,128.04

It shows cash receipts since the beginning of 1916:

From ore sales	$ 2,861,304.61
From interest and discount	11,755.34
	$ 2,873.059.95
And that the operating expenses for said period amounted to	1,804,007.92

His assertion of the difference between the net profits and dividends for 1915 and 1916 is as follows:

YEAR	NET PROFITS	DIVIDENDS	DIFFERENCE
1915	$1,096,819.37	$ 320,000.00	$ 776,019.37
1916	2,368,682.90	1,432,000.00	936,682.90
Total	$3,464,702.27	$1,752,000.00	$1,712,702.27

By reference to the respective trial balances from month to month, every item of receipt and disbursement is neces-

sarily accounted for, and hence, the imagined discrepancy for the years 1915 and 1916 is disproven.

It is worthy of note that no co-owner of the Hercules Mining Company ever claimed there was any such discrepancy as counsel now argue; and neither Mrs. Cardoner nor her able attorneys who prepared and tried this case, ever claim such.

The complaint is silent as to any such charge; Mrs. Cardoner never asserted it at the trial; and her then attorneys did not present such a claim, although the record shows the following:

A. From April, 1916, to October, 1916, Mr. Day had a standing offer to Mrs. Cardoner to inspect the properties and the books with whomsoever she might choose; she did not do so;

B. Pending litigation, at the hearing of objections to interrogatories, all the defendants joined in tendering to Mrs. Cardoner and her counsel the right of inspection and examination of all the assets and books of the company. This offer was declined. The plaintiff and her attorneys evidently preferred to take Mr. Day's word rather than to rely upon the testimony of any experts whom she might engage;

C. Mrs. Cardoner admits that she never demanded and was never denied inspection and examination of the books and properties; and

D. Each co-owner in the Hercules Mining Company had as much right as E. R. Day to inspect the books kept by their employes, and to have all information divulged to them by their mining engineers, mine superintendent and employees.

At the trial (pp. 539-540), respective counsel stipulated:

'(P. 540.) MR. GRAVES: I will stipulate, if agreeable to counsel, that these interrogatories go in for all purposes of this case."

The record shows:

A. June 4, 1917, Amended Bill of Complaint filed;

B. June 4, 1917, Interrogatories filed;

C. August 3, 1917, Answer of Eugene R. Day to Interrogatories filed;

D. June 30, 1917, Answer of Harry R. Allen, to Interrogatories 18 and 27 filed; and

E. December 5, 1917, Trial of Cause begun.

Mrs. Cardoner's former attorneys received the answer to these interrogatories in August, 1917, and the offer to inspect the mine was made in Open Court in June, 1917.

They had the answer to these interrogatories from August, 1917 to December, 1917, and Mrs. Cardoner's agent, Allen, testified at the trial that he called her attention to the difference between the profits and dividends and she never denied it.

The contention now made by appellant's counsel after the death of Mrs. Cardoner was never urged during her lifetime; it is contrary to the record, false in fact and comes with bad grace at this late day.

No question of Eugene R. Day's integrity was ever made at the trial, nor was there any claim of improper bookkeeping or suppression of such facts as are now argued.

On the other hand, the record shows (pp. 733-734) (referring to administratorship):

"Q. Something has been said here, Mr. Day, about the difference between a statement of the receipts

and disbursements, and some $5,000.00 item of your fees. Will you tell the circumstances about that?

THE COURT: It seems to me we are taking too much time to go into these details. I cannot see that they are important.

MR. BEALE: Very well your Honour please.

THE COURT: There is no question made here of this man's integrity in handling the estate is there gentlemen?

MR. GRAVES: No, sir, not a bit."

This concession makes his testimony impregnable; and when he says:

"I gave her all the information I had" etc.

'I never concealed anything from Mrs. Cardoner,"

all contention that he practiced any fraud upon Mrs. Cardoner either by mis-representation, concealment or suppression of fact, is ended. That concession, coming as it did from Hon. Frank H. Graves, Judge Morgan J. O'Brien, the eminent counsel who prepared the cause for trial and who, since the decision below are no longer connected with the case, is effectual as a conclusive admission of the fact there conceded.

This record shows that Judge Dietrich found as a fact that Mrs. Cardoner wa s not a credible witness and no error is predicated on that finding; and although she is the sole witness who charges E. R. Day with fraud, her attorneys concede his integrity and the court found the facts for defendants. In all cases of conflict between his evidence and Mrs. Cardoner's statements, the findings are supported by the testimony of concedely credible witnesses of unquestioned integrity. The familiar rule applies.

Butte & Superior Copper Co. vs. Clarke-Montana Realty Co., 39 S. C. 231-248 U. S.

The case presents this condition:

Plaintiff stands in a court o fconscience charging Eugene R. Day with direct and constructive fraud, and while she has him thus charged, she is offered every opportunity to inspect the properties and the books with her own experts and to find any evidence that might exist to prove such charges. This offer was declined; and the plaintiff and her attorneys preferred to stand upon his word rather than upon the testimony of any person whom they might employ to impeach his integrity or his honor. This fact is a certificate to his credibility, integrity, honesty and character and is the strongest testimonial which plaintiff could possibly give him.

DEPTH OF ORE BODIES.

At several places in appellant's brief, the statement is made that E. R. Day did not tell Mrs. Cardoner of the probable depth of ore bodies.

Refuting these statements the record shows:

WITNESS E. R. DAY, p. 727:

"Q. Was there any statement made in reference as to how deep it might go?

A. Yes, that was talked over.

Q. What was it?

A. She asked me how deep that I supposed it would go, and I told her no one knew that; that the best opinion we could have would be proved by the example of others who mined in the district close to that particular place.

Q. Well, did you go into the history of those in any way?

A. Well, I recited further my idea in the matter, and I told her it was my opinion at that time that the Tiger did not pay lower than the fifteen or eighteen hundred feet below the creek level."

Witness then says that the creek level was from fifty to one hundred feet below No. 5 tunnel.

Plaintiff's expert, Greenough, estimated the depth at 1600 feet and defendant's witness, Burbidge, at 1900 feet below the Hummingbird tunnel, giving the exact figures of probable depth which Day had told Mrs. Cardoner.

In addition, Mrs. Cardoner's agent, Allen, says (p. 612):

"Q. All right.

A. This was all roughly, you understand. Then I told her also—well, she had lived there in that camp as long as I had, and she knows all of these things, and the different mines that had been worked.

MR. O'BRIEN: Hold on.

A. That is, the Tiger and the Poor Man I recited."

Witness then tells what he discussed with her.

These facts show that Mrs. Cardoner was accurately informed as to the probable depth of the mine.

See also Allen's testimony pp. 612 et seq., stating that he discussed the depth of various mines in immediate vicinity of the Hercules, with Mrs. Cardoner.

In appellant's brief at p. 68, the record is misquoted. In referring to Burbidge's estimate the depth of the Tiger mine, counsel have omitted the remark of the court, and also the

reference to Burbidge's former testimony. The correct record is at pp. 904 and 901 of the transcript, as follows:

"(P. 904). Q. Mr. Burbidge, how did you arrive at your estimated depth of the mine below the Hummingbird tunnel?

A. By assuming that it would go as deep as the neighboring mine, the Tiger.

Q. How deep does that go?

A. It was sunk to a depth of 2200 feet but it was not profitably operated below——

The Court. You have already answered that in your statement?

A. Yes sir, that was in my statement.

Referring to Mr. Burbidge's statement at p. 901, we find:

"In estimating that depth, we are controlled by the data available concerning other mines in its vicinity. The Tiger, its nearest neighbor, ceased to be profitable below a depth of 1800 feet, which corresponds to 1900 feet below the Hercules No. 5 tunnel, etc."

Appellant's present attorneys are seemingly unfamiliar with the record and the situation as shown at the trial.

ORE IN TRANSIT.

At pp. 47-89-91-92-93, and other places in Appellant's brief, the ore in transit ($1,048,864.14) is treated as all profits.

This is clearly erroneous, as it contains each element of dividends, cost of mining, milling, transportation, treatment, reduction, refining, marketing, fluctuation of value, income

and other taxes, depreciation, and repairs, and outlay involved in the entire operations.

WITNESS JEROME J. DAY, at p. 1135 says:

"Q. What are the elements involved in that ore in transit?

"A. It is the element of fluctuation or decrease in price.

"Q. That is the risk, is it?

"A. That is the risk.

* * *

"Q. From the amount that is received from the ore in transit what sums are paid?

"A. Operating expenses and dividends, upkeep, and we class such items as overhead, upkeep, taxes and such as operating cost.

"Q. Then the ore in transit would contain those items as long as it was in transit?

"A. It would."

The testimony of Harry L. Day, pp. 970-981, read in connection with the table showing annual net profits, dividends and balances, heretofore set out, accentuates this statement.

The owners of the Hercules Mine started at zero in the financial world; their entire fortune has been made from the dividends declared from the profits yielded from the ore that was shipped; and from the same source the entire equipment of the Hercules Mining Company has been acquired.

If we deduct from the ore in transit ($1,048,864.14), the various items of cost above shown, the amount left for dividends approximates $400,000.00, of which Cardoner's one-sixteenth would be $25,000.00, when distributed. But

this ore must remain in transit to the approximate end of the mine's life. Estimating this period at ten (10) years and taking 12 1-2 per cent as the rate of return which a mining investor should receive (Greenough pp. 1087 and 1095) the present worth of her interest is $11,111 1-9.

She was overpaid in the cash estimate by $14,342.43; and, applying such overpayment to the above item, she is still overpaid. This should effectually dispose of the claim asserted about the "ore in transit" item, even if we disregard the testimony showing the facts as heretofore set out.

The item is negligible in a transaction of the magnitude of that involved.

ORE IN TRANSIT, CASH ON HAND, SMELTER AND REFINERY.

The persistence with which appellant refers to these various items as severable, distinct assets, makes a brief summary of matters pertaining thereto, necessary.

Jerome J. Day says, (p. 1010):

"Q. Do you know why the Hercules Mining Company ever went into the purchase of a smelter or an interest in the smelter?

"A. Because they could not get an outlet for their ore on anywheres near the terms of their previous contract or what they believed to be a legitimate charge for the handling of their ore.

"Q. As I understand that situation, that smelter and refinery simply take the place of your former contract?

"A. It absolutely did."

Harry L. Day says, (pp. 992-993) that the mine, cash

on hand, ore in transit, "smelteries" (sic—smelter) and "refineries" (sic—refinery), "mills" (sic—mill), and all of its assets must be considered as a whole as "it all rides together."

The following facts are plainly shown:

(a) The original smelter contract of the Hercules Mining Company was very advantageous and could not be renewed.

(b) The Company would not enter into a new or different contract, as the terms fixed by the smelter company were excessive;

(c) It faced a crisis which compelled it either,

(1) To purchase an interest in a smelter and refinery, or,

(2) To close down.

The management chose the former course and purchased an interest in a smelter at Northport, Washington, and a refinery at Pittsburgh, Pennsylvania; the sums paid for these properties would have gone to pay the cost of smelting and refining under any contract with the smelter people. The ownership and operation of these properties compelled the maintenance of a large CASH reserve and of ore in transit, because it takes three to four months (Jerome J. Day p. 1134) to get returns on ore shipments.

At the time of the transaction these various items aggregated the following:

(a)	Ore in Transit	$1,048,864.14
(b)	Northport S. & R..... ...	288,289.70
(c)	Pennsylvania Refinery ...	87,500.00

(d) Cash on Hand (p. 95) ... 370,521.13

Total.....$1,795,174.97

But taking the items of cost and expense from the ore in transit, we have shown above, the sum for distribution as dividends would be approximately $400,000.00.

Using this item with the above figures, we have:

(a)	Ore in Transit (probable dividends)	$ 400,000.00
(b)	Northport Smelter	288,289.70
(c)	Pennsylvania Refinery ...	87,500.00
(d)	Cash on hand	370,521.13

Total.....$1,146,310.83

The Reeves' 1-16 interest and the Samuels' 1-32 interest were sold upon a basis of $4,000,000.00 for the entire mine and its properties, when the mine was eight (8) years younger than at the time of the transaction.

Likewise, the Adams' option of 1904 was upon the same basis, and Eugène R. Day first estimated the value of the mine as $4,000,000.00, and Hutton's estimate was the same.

Eugene R. Day says he told Mrs. Cardoner the ore in transit was worth probably over $800,000.00 to $1,000,000.00, and in the transaction, Day and Allen estimated the cash at $1,600,000.00.

Day therefore, paid the original $4,000,000.00 price for the mine plus $1,600,000.00 for the added improvements, etc.

His estimate of $1,600,000.00 is a fair approximation of the total sums invested in the four items, to-wit: $1,795,-

174.95, and is greatly in excess of the dividends which could be reasonably expected from the ore in transit, plus the total amounts invested in the smelter and refinery, and the cash on hand, to-wit: $1,146,310.81.

It is very evident that the price he paid, to-wit: $5,600,000.00, is at least a fair approximation of the true value, and brings the transaction, so far as price is concerned, within the admitted rule.

Appellant's brief, p. 93 et seq., treats the ore in transit the same as cash in bank. Appellant overlooks the fact that when the mine is in active operation ore is shipped daily, and that it requires three months to get returns on any shipment. The result is that when returns from shipments are received it is paid out largely to put other ore in transit. The continuous circulation of this ore in transit is a circulating or revolving fund, the larger portion of which is put back into the actual operation of mining, milling, transporting, smelting, etc., of the other ores still in transit.

In Dooley v. Pa. R. R. Co., 250 Fed. 142, syllabus point 3, reads:

> "The court will take judicial notice that no railroad system can be successfully operated without a revolving fund, available for the payment of wages and for other necessary expenses in railroading."

The entire evidence and the findings show that Day gave Mrs. Cardoner all the information he possessed. In addition, she sought the advice of Allen, the most efficient mine accountant in the Coeur d'Alenes, whom she thus describes (complaint par. 6, p. 18):

"At the time of the transaction aforesaid, Allen was believed by the plaintiff to possess exceptional opportunities by reason of his connection with the mine operations to know the value of the mine, its prospects, and what was being done in its operation. She believed him also to be a man of integrity and upon whose statements she might rely and she was influenced in making the sale by his representations."

The whole record shows that Day's conduct measures well up to the standards required of a mine manager in purcashing the interest of a co-owner who is at a distance and who is, therefore, bound to rely and does rely upon such manager for full information; although, in this case, Mrs. Cardoner was personally present from April to October, 1916, for the sole purpose of looking after and becoming acquainted with this property and its value and did not rely upon Day, nor did she inform him that she was relying upon him for information, after the close of the estate; but on the other hand, she notified Day on October 14, 1916, that Allen was her agent and would tend to her business; and thereafter, conducted her own investigation through her agent, her friends and co-owners, sought advice entirely independent of Day, proposed the sale herself, and tried to compel him to pay $6,000,000.00 by threats of selling to his business competitors and fixed her own terms of sale requiring $50,000.00 as a cash payment with the understanding that it would become hers if the transaction failed.

These facts bring this case clearly within the rules stated at,

POINT III.

A transaction cannot be assailed on the ground of breach of alleged fiduciary relations where the complaining party conducted an independent investigation, acted through her own agent, consulted her friends and did not rely upon the fiduciary to furnish information.

Colton v. Stanford, (Cal.) 23 Pac. 16, (pp. 2123).
Curran v. Smith, 149 Fed. 945 (3rd C. C. A.) affg. 138 Fed. 150 (156-158).
Pittsburg L. & L. Co. v. Northern C. L. Ins. Co., 140 Fed. 888 (893-bottom) (cases collated).
Palmer v. Shields, 125 Pac. 1051.
Blank v. Connor, (Cal.) 141 Pac. 217, (220, last paragraph).
Kinne v. Webb, 54 Fed. 34 (Point II, p 39) (8th C. C. A.)
Littell v. Hackley, 126 Fed. 309, (6th C. C. A.)

Likewise, where concealment is the ground of action, it must appear that plaintiff relied upon defendant to make disclosure of the fact concealed, and that the concealment was a moving inducement to the plaintiff's change of position.

The concealment, misrepresentation or non-disclosure must be intentional.

14 Am. & Eng. Ency. of Law, Second Edition, p. 69.
Colton v. Stanford, 23 Pac. 16 (syllabus Point I).

In such a case the question is, "What did the trustee conceal," and not "What would a search by him have disclosed." The trustee is not compelled to search for facts

which he does not know nor to express his opinion; his duty is discharged when he gives the information which he has.

Where the relation is trustee and beneficiary, reliance must be alleged and shown.

> Burke v. McGuire, 98 Pac. 21 (25) (right hand column, bottom). "Must allege that he relied on them in his subsequent action."

The gravemen of the complaint was originally that Allen (who was said to be Day's agent) MISREPRESENTED certain facts while E. R. Day was charged with CONCEALMENT. The charges of misrepresentation by Allen were declared groundless by the trial court, and no error is predicated on the findings on that issue. Appellant now argues "CONCEALMENT" by E. R. Day; but the record is silent as to what it was Day "CONCEALED" and the most diligent search of appellant's brief, the evidence in the case and the decision below, throws no light upon the subject.

POINT ~~VII.~~ VI.

Parties who deal with and calculate the chances of value of property, of speculative value, are bound by their transactions, unless there is an element of breach of confidence, misrepresentation, or culpable concealment, amounting to actual or constructive fraud.

> Colton v. Stanford, 23 Pac. 16 (24-25)
>
> "Where parties * * * intentionally speculated" and "the event turns out different from that expected * * * this error * * * is not such a mistake * * * as entitles

the disappointed to any relief. The parties * * * assume the risks."

Taber v. Piedmont Heights Bldg. Co., 143 Pac. 319-320. Rule applied where the parties, "treat upon the basis that the fact is doubtful. Can mistake be alleged in a matter which was considered as doubtful and treated accordingly? Chancery will certainly not relieve."

Cleveland Cliffs Iron Co. v. East Itasca Mining Co., (8th C. C. A.) 146 Fed. 232 (syllabus Point 4) (p. 236 et seq.), quoting from U. S. v. Barlow, 137 U. S. 271 (281); 10 Sup. Ct. 77; 33 L. 346, and collating authorities.

Moss v. Downman, 176 U. S. 413, 417, says: "The speculator is never an object of favor."

Gertgons v. O'Connor, 191 U. S. 237, 246, says: "He evidently took his chances * * * speculating upon possibilities which have not been realized, and having so speculated he cannot complain." The court cannot aid in such case because it is a "chance," simply and there are "no fixed rules to guide their judgments," Gordon v. Butler, 105 U. S. 553.

W. W. P. Co. v. Kootenai County, 210 Fed. 867, affg. Dietrich, J., who in an opinion on file below and in the record that went up held that value is generally so uncertain that a finding of total value of $1,718,636.37 for an electric system would not be reversed where the controverted difference is $200,000.00 or $300,000.00 more or less.

Pomeroy's Equity, 4th Ed., Vol. 2, Sec. 855, pp. 1745-1746.

POINT ~~VIII~~ XII

Mining properties are necessarily of speculative value, and transactions concerning them cannot be set aside for inadequacy of consideration where the price paid is a fair approximation to its value rather than the full value of such property.

Brooks vs. Martin, 2 Wall. 73.
Patrick v. Bowman, 149 U. S. 44.
Richardson v. Heney, (Ariz.) 157 Pac. 980.

The laws of the mining states almost unanimously recognize the difficulty of ascertaining the value of mining property, and provide, therefore, for taxing the actual output of the mines, rather than to undertake to ascertain the value and assess the property upon the value thereof.

Foster v. Hart. Cons. Mining. Co., 122 Pac. 48 (50) "Cannot be ascertained with any reasonable degree of certainty until mined."

Reding & P. R. R. Co. v. Balthazar, 13 Atl. Reports, 294 (297). "The difficulty indeed the impossibility of proving the specific value."

Southern Development Company v. Silva, 125 U. S. 247; 31 L. 678; 8 S. C. 883. "In the nature of the thing utterly speculative."

Gordon v. Butler, 105 U. S. 533; 26 L. 1166. "Necessarily, be more or less speculative character."

Biwabek Mng. Co. v. U. S., 242 Fed. 9 (16). "Great, if not insuperable difficulty" * * * depend "upon unknown and changing conditions."

Doyle Internal Revenue Collector v. Mitchell Bros.,

235 Fed. 686, (691). "Has no market value. Cannot be measured. Predominately speculative."

Fred Von Baumach, Collector, Etc., v. Sargent Land Co., 242 U. S. 503; 37 S. C. 201 (208). "Value * * * lessened from exhaustion. Cannot be replaced."

Hanley v. Fed. M. & S. Co., 235 Fed. 769 (771-773-774-777). "Real value * * * generally unknown * * * subject to great and sudden fluctuations."

Idaho Tax Commission Report 1913-1914, p. 46. "No method whereby cash value of a vein mine * * * can be determined * * * until the mine is worked out."

At pp. 96-97, of appellant's brief, we find:

"One only has to read the testimony of Burbidge and Greenough to see that Eugene R. Day never disclosed to Mrs. Cardoner but little of the elements that went to make up the value of this mine. Had he acted in as good faith as the law requires, he would have had his experts go into the mine, make the necessary measurements, make up full statements of all conditions as the court has required him to make in answer to interrogatories in this case, would have given the size of the ore shoots, have given a detailed statement not only of the conditions but of the possibilities of the mine and would have done this in writing so that she might have had the information for expert advice."

The citation from which counsel quotes at p. 97 of his brief does not sustain the rule as above set forth.

It holds in common with all other cases that the trustee must not conceal anything which he knows; it does not hold that he must not conceal anything which he does not know, because that is an impossibility; neither does it state that the trustee must make a search to find out what he does not know and then divulge that to his co-owner who is threatening to sell out to his rival unless he purchases.

This is not a case where the selling partner could not make such inspection and search because Mrs. Cardoner was personally present and could have learned from the mine's superintendent, the engineer, the bookkeepers, the accountants, the mine foreman, and every employee, the same facts which Eugene R. Day might have found from those same people. She was a member of the partnership as much as Mr. Day, and the employees at the mine from the highest to the lowest were her servants as much as his, and would have to inform her as to all matters concerning which they might have informed him. She could have employed accountants, engineers, geologists and mineralogists and had them examine and make reports; Day was not required to do that for her, but only to allow her access to the mine and accounts.

She never made demand for inspection of either the property or the books, nor did Day conceal anything whatsoever from her, nor did he ever suppress, conceal or misrepresent or misstate any fact within his knowledge to her.

From Colton v. Stanford, (Cal.) 23 Pac. 16, we quote point 1 of the syllabus:

> "Where a beneficiary, in negotiating with her trustees for a settlement, renounces all confidence in them, and acts exclusively on the advice of her own per-

sonal friends and advisers, specially selected by her to make investigations, and counsel her, a contract of compromise entered into between her and the trustees, who during the investigation acted in good faith, and disclosed everything within their knowledge, will not be set aside on the ground that the trustees did not impart all the knowledge which they might have acquired by diligent and skillful search."

From the opinion (23 Pac. 21), we quote:

"The findings show that the defendants in good faith disclosed every fact within their knowledge. There is nothing in the findings to show that plaintiff or her agents were misled as to any matter except the statement in regard to the number of shares of the Rocky Mountain Coal & Iron Company stock, which they claim to own, though held by Mr. Colton. Of this matter we shall speak hereafter. Here, therefore, we have a case in which—assuming the existence of a fiduciary relation, and that the presumptions as to confidence and the burden as to proof are as claimed by appellant—the undisputed facts show that there was absolutely no confidence reposed by the beneficiary, but that she acted exclusively upon the advice of several disinterested experts and professional friends, specially selected to investigate and counsel her, because of their ability and familiarity with the affairs of the trustees with whom she was dealing, and who acted towards her in the highest good faith. To hold that, under such circumstances, a contract, entered into by the parties, compromising and settling disputes of the most doubtful character and value, cannot stand, if it subsequently appear that the

trustee did not impart to the cestui que trust not only all the knowledge of the transactions of which he was possessed, but all that he might have acquired by diligent and skillful search, would be to place an absolute embargo upon all settlements of disputed questions between parties holding trust relations, although equity favors the amicable adjustment of claims, which, like those involved in this settlement, bid fair to become a fruitful source of litigation."

After discussing the policy and reasons of the law under such circumstances, the court concludes, (23 Pac. 22):

"It is unnecessary for us to review the authorities on this subject. They will be found, we think, to fully support the views we have expressed; and in order to make as brief as possible this opinion, which, perhaps is already unnecessarily extended on this question, we simply cite some of the cases, without commenting upon the peculiar features of any of them. We have examined the cases cited by appellant, and find nothing in them which conflicts with what is said herein. Kimball v. Lincoln, 99 Ill. 578; Gage v. Parmalee, 87 Ill. 330; Casey v. Casey, 14 Ill. 113; Farnam v. Brooks, 9 Pick. 213; Knight v. Marjoribanks, 11 Beav. 324; Morse v. Royal, 12 Ves. 355; Hunter v. Atkins, 3 Mylne & K. 113; Hager v. Thomson, 1 Black, 80; Courtright v. Burnes, 2 McCrary, 532; Geddes' Appeal, 80 Pa. St. 460; White v. Walker, 5 Fla. 478; Hall v. Johnson, 41 Mich. 289, 2 N. W. Rep. 55; Bowman v. Carithers, 40 Ind. 901 Turner v. Otis, 30 Kan. 1, 1 Pac. Rep. 19; Murray v. Elston, 24 N. J. Eq. 310; Korn v. Becker, 40 N. J. Eq.

408, 4 Atl. Rep. 434; De Montmorency v. Devereux, 7 Clark & F. 188; Hough v. Richardson, 3 Story, 690; Loesser, 81 Ky. 139; Motley v. Motley, 45 Ala. 558; Kisling v. Shaw, 33 Cal. 425."

As showing Mrs. Cardoner's mental attitude toward Eugene R. Day at the close of the administration on October 14, 1916, we quote:

WITNESS HARRY L. DAY, at p. 969,

"Q. Now, aside from what you heard of Mrs. Cardoner's objections, as you have explained, state what, if anything, you knew in fact, aside from any action on her part, concerning the existence of any attempt or acts in misrepresenting or defrauding her, or failing to make proper disclosures to her, as alleged in the complaint in this case?

A. I never talked with Mrs. Cardoner directly about the matter , or even indirectly. I talked with her a little bit about the property. Some time in the summer she came to the office to see my brother, and he was not in, and she was considerably agitated, and I talked to her and tried to make some explanation. She was very much annoyed at the delay in settling up the administration, and roasted the lawyers and the court and the law and my brother, and generally everybody pretty severely. I have known her a long time, and I was not disturbed about it, and explained to her that I thought things were going about as fast as they could, that lots of this delay was caused by the statutes, which compelled publication, and that sort of thing, and we all had those experiences."

WITNESS EUGENE R. DAY, at p. 732:

"Q Well, why?

A. She said—I could not give it to her because Mr. Gray and Mr. Wourms had told me that the time had not arrived when I was authorized to give it to her. I acted under their direction, and of course I did not give it to her. She came in the office, I remember the occurrence, and she said that the reason that she could not get her money, was that I was too busy, that Mr. Gray was too lazy, that Mr. Wourms was too lazy, and that is the reason that she could not get her money, and that she had advice on the matter, and she was told that she could get it, and she was going to have it."

We have heretofore shown that immediately at the close of their transaction on October 14, 1916, she notified both Wourms and Day that Allen would attend to her business. Mr. Wourms says (pp. 959-960):

"A. No, there was not at that particular time, during that conversation; but after the proceedings in the probate court had been completed, I walked out and met Mrs. Cardoner in the corridor there, and she had pestered the life out of me during the Rossi case about wanting her property, and controlling it and handling it herself, coming to the court and calling me out, I think three times in one day during that trial, and I told her now she had her property, and I was glad it was settled, and she could handle it herself. And she told me that Mr. Allen would attend to her business."

She immediately checked the account which Eugene R.

Day handed her as administrator (Exhibits 15 and 16, pp. 1186-1189); she found what she thought were errors therein and immediately sought Harry R. Allen that same day, went over the matter with him, and he made the notation marked Exhibit 17, pp. 1189-1190, and Exhibit 49, p. 1310.

She also took steps at once to sell her stock in the Wallace Bank & Trust Company. This stock was inherited from the estate and was stock in the Day bank. Allen sold it for Mrs. Cardoner and reported the sale to her in his letter (Ex. 23, pp. 424-425) in which he states (under date 10-19-16):

> "I also enclose certificate for ten shares of the Wallace Bank & Trust Co., stock, and a check for $1622.40 in payment of same. Please sign your name on the back of this certificate and have it signed by one witness, and return to me by registered mail."

About October 18, 1917, Allen, at her request began negotiations with E. R. Day for the disposal of her Hercules interests, etc., after she found from Paulsen and Hutton their ideas of its worth, and Allen threatened Day that if he did not buy the stock she would offer it to them and then to the A. S. & R., the known business rivals of the Days, and asked of Day a sum which he refused to pay even under her threat, telling Allen to sell it to whosoever he would, that—"I'm through." This threat does not show reliance upon Day, but does show her defiance of him.

During the negotiations for the sale of her interests, she never talked with Day in any way directly; never asked him for any information whatsoever, nor let him know that she was relying on him for information other than or different from that she had already obtained from him, from Hutton,

Paulsen, Woods, Allen, the monthly statements and the various sources of information through the newspapers, trade journals and mining papers which she admitted having read at different times.

The findings of the trial court are sustained.

VALUE.

Appellant's brief, pages 64-90, attempts to estimate the values of the mine until it is exhausted.

Throughout this discussion the appellant repeats several common errors:

(a) In estimating the ore in transit, as all profits and as ready cash;

(b) In calculating future imaginary profits at $7.29 per ton (p. 91) with the ore in transit, considered all profit;

(c) In taking $7.50 per ton as profits (p.89);

(d) In taking the ore lengths as measured by Greenough on the maps (brief p. 84), and disregarding their true length;

(e) In failing to appreciate that Mrs. Cardoner sold a minority interest (1-16), and in calculating this minority as a majority.

Appellant overlooks the conceded rule of valuation as stated by Judge Dietrich, (pp. 1400-1401):

"Upon consideration of the entire matter my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was prob-

> ably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required. Brooks v. Martin 69 U. S. 70, Patrick v. Bowman, 149 U. S. 411."

and assumes that where one mining partner sells a minority interest to the mine manager, the vendor is entitled, not only to the reasonable value at the time of the sale, but also to the actual present cash valuation of all future possible profits to the end of the mine's life.

Appellant also assumes that the purchaser shall make no profit whatsoever, but that he is limited to the value paid the seller, although the purchaser is compelled to continue the business for years to realize such possible values and to assume all the risks of the business. No authority is cited to sustain such a position.

Appellant computes the probable future profits upon the assumption that the ore bodies, mineral content, mineral profits, rates of shipment, cost of production and other elements will remain constant to the end of the mine's life; that no faults, dikes or geological changes will interfere with the continuous ore reserves which are largely speculative, because not visible; that there will be no shutdowns; labor difficulties, or other events to disturb the orderly mining operations; and that the seller must be relieved from every risk of the business, from all income, and other taxes, and must be paid in advance, the entire theoretical value of the mine.

In no other business, pursuit, enterprise, or occupation, has such a rule ever been upheld.

In the brief, appellant disregards the testimony of the

witness Greenough, who was the only expert who testified for plaintiff.

We shall, however, discuss Mr. Greenough's testimony, as it is sufficient to sustain the court's finding, on the question of value.

Mr. Greenough assumes that there are four ore shoots from which mineral was extracted and gives them the following sizes at the Hummingbird, or No. 5 tunnel level:

East Ore Shott No. 1	Length 200 feet
East Ore Shoot No. 2	Length 220 feet
Middle (WEST)	Length 630 feet
West (MIDDLE).	Length 325 feet
	1375 feet

and estimates that such ore bodies of that constant length will go to a depth of 1500 feet below the creek level (p. 1084).

His estimated tonnage and values are therefore based upon the following size ore bodies (pp. 1056-1057):

	Length.	Width.	Sq. Ft. Area
East Ore Shoot No. 1	200 ft.	4 ft.	800
East Ore Shoot No. 2	220 ft.	4 ft.	880
Middle (WEST)	630 ft.	15 ft.	9450
West (MIDDLE)	325 ft.	5 ft.	1625
	1375 long		12,755

which he erroneously states at 12,775; and "assumes" that these lengths will go to a depth of "1500 feet below Canyon Creek," (p. 1057).

His estimate of "1500 feet below the level of the creek"

is an estimate of 1600 feet below the collar of the shaft in the No. 5 tunnel, as that is 100 feet higher than the creek level. (Burbidge, 920.)

The physical facts as shown by Witness E. R. Day as to the number of shoots of ORE at the No. 5 tunnel, are, (p. 819):

"Q. So that on your No. 5 level and above, you had THREE shoots, AT LEAST THREE SHOOTS, didn't you?

"A. Well, I think that there were three shoots, not at least three shoots.

At page 825 he describes each of these three shoots.

Witness Burbidge (p. 924), testifying from actual measurement says, at the Hummingbird or No. 5 tunnel level:

	Length.
"The East stope has	150 ft.
Middle stope	225 f.
West stope	600 ft.
Total	975 ft.

"The East Stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut off or merged in this middle stope.

"The midle stope has a length of 225 feet. * * * The middle stope or shoot comes down almost vertically without any particular rake. What it has is slightly to the west. It is quite evident that at some step very little below the 600 level it will merge in the west stope.

* * * And there is very little doubt that the middle stope will be cut off or merged in the same stope, and that below a depth of about 800 feet, there will be but the one shoot of ore, the west shoot.

"(West Stope) The length of that stope on the No. 5 tunnel is 600 feet. On the 200 level it is only 500 feet. On the 400 and the 600 level it is also — on the 400 it is shorter. On the 600 the drift has not yet reached the end of it, but it is so near to it that we are safe in assuming that it will be the same length, 500 feet. I should go back for a minute to the west shoot and point out that it has a very strong rake in the east, in this direction."

Burbidge gives the average WIDTH of the big ore shoot (WEST STOPE) at the No. 5 tunnel as 15 feet; but at the 200 level below the No. 5 tunnel it is only 12 feet. (pp. 917-918).

The following physical facts are therefore quite plain:

(a) The EAST ORE SHOOT No. 2, (described by Mr. Greenough) never produced commercial ore:

(b) The EAST ORE SHOOT No. 1 (described by Greenough) cuts off entirely at about the 200 level or between that level and the 400 level, and his given length of that body is 50 feet too long;

(c) The big ore shoot (WEST, which Mr. Greenough erroneously calls MIDDLE) is but 600 feet long at No. 5 tunnel and Greenough's map measurement is wrong, as he measured to the end of the timbers; whereas Anderson, Hercules engineer testified that the timbers extended in most cases beyond the ore bodies;

And as to the same big stope, Mr. Greenough assumes a constant width of 15 feet, whereas it narrows at the 200 level to 12 feet and is of that width at the different levels below, so far as it was exposed when Burbidge saw it.

(d) The Middle Ore Shoot (which Mr. Greenough erroneously calls the WEST) cuts out and merges at the 800 level with the big ore shoot (WEST) and he erroneously estimates it for the full 1600 feet below the Hummingbird tunnel.

His estimated length of this middle ore shoot is also too long by 100 feet.

These measurements relate to facts at and below the No. 5 tunnel; but Mr. Greenough is also at fault in his measurement of a 50 foot depth ABOVE THAT TUNNEL in the following lengths:

East Ore Shoot No. 2..
220 feet (Never produced any ore)
East Ore Shoot No. 1...
50 feet excess length
"WEST" (Middle) .....
100 feet excess length
"MIDDLE" (West) ...
30 feet excess length

The mineral tonnage of the existing ore bodies in their actual sizes (instead of erroneous sizes ascribed by Greenough) reduces his estimate of tonnage and values, by the following:

EXCESS TONNAGE ABOVE NO. 5 TUNNEL AT $9.39 PER TON:

(Tonnage calculated at 9 cu. ft. per ton.)

	Length.	Width.	Depth.
East Ore Shot No. 2	220	4	50
East Ore Shoot No. 1	50	4	50
BIG Ore Shoot (West)	30	15	50
"Middle" (WEST, True Name)	100	5	50

TOTAL	Tonnage.	Value.
	11,277 7–9	$105,891.03

EXCESS TONNAGE BELOW THE LEVEL OF NO. 5 TUNNEL AT $4.50 PER TON.

	Length.	Width.	Depth.
A—East Ore Shoot No. 2 (Never Produced)	220	4	1600
B—East Ore Shoot No. 1 (Cut Out about 200 Level)	200	4	1400
C—Excess length of ore body—Big Ore Shoot—at #5 tunnel and below	30	15	1600
D—Excess length big ore shoot from 200 level down	100	15	1400
E—Excess width of Big Ore Shoot from 200 level	500	3	1400
F—Middle Ore Shoot—cuts out or merges with Big Ore Shoot at 800 level	325	5	800

TOTAL	Tonnage.	Value.
	972,000	$4,374,000

Adding these two items we have:

	Excess Tonnage	Excess Value.
Above No. 5	11,277 7–9	$ 105,891.03
Below No. 5	972,000	4,374,000.00
Total	983,277 7–9	4,479,891.03

When these are deducted from Mr. Greenough's estimates, we have the following:

	Tonnage	Value
Greenough's estimates (p. 1059) 2,310,000		$10,750,000.00
Deduction to meet physical facts	983,277 7–9	4,479,891.03
LEAVING 1,326,722 2–9		$6,270,108.97

Mr. Greenough's prices are taken in the above estimates; but Mr. Burbidge showed that the prices taken by him included two "BOOM PERIODS" one of which involved the extraordinary war-price period up to the date assumed by him, from its commencement.

The errors in estimating the length and width of Ore Shoots by the map, was exposed by Anderson, Hercules Engineer, at pp. 1029–1030. And in addition, Mr. Greenough was totally indifferent to the fault shown on the map, which marked the easterly limit of the Ore Shoots and which, if projected, would have cut off the ore bodies at the levels shown by the following testimony:

Anderson pp. 1030 to 1032,
Greenough pp. 1077 to 1084.

In speaking of the rates of interest which an investor in mines is entitled to receive, Mr. Greenough says, (pp. 1086–1087):

"Q. For an investment in a mining property ten per cent is a reasonable return, in addition to getting back your money at a period of time, is it not?

"A. Yes, I would say it was hardly enough.

"Q. Then twenty per cent?

"A. No, I would not say that.

"Q. Well, fifteen?

"A. Ten to fifteen per cent."

At page 1091, the witness says:

"A. Before I answer this question, however, I stated that—I want to testify that that was an estimate of the future earning value of the mine. The future earning value. I didn't answer it in the same sense that you are now propounding it to me."

After seeing how this per cent of return was applied in calculating what an investor should receive, the witness explained that such investor would first get his money in return and then, (p. 1095) says:

"Q. What rate of interest do you want to calculate on your figures, Mr. Greenough?

"A. Well, I will take a split between ten and fifteen. I will take twelve and a half.

"Q. Twelve and a half per cent?

"A. Yes, on your assumption that you have made.

At pages 1090 to 1091, Mr. Greenough states that it would require 13.75 years to remove his estimated tonnage, at the average rate of tons mined for the years from January 1, 1907 to October 28, 1916, as testified to by Mr. Burbidge, to-wit: the rate of 167,888 tons per year.

PROBLEMS:

At pages 1101-1102, Mr. Greenough testified:

"Q. Assuming that on the 28th of October, 1916, the sum of $4,000,000.00 was paid for the mine, if it would take ten years to work out the $10,000,000.00,

that would be 15 per cent per annum on the $4,000,000,00, wouldn't it?

"A. I don't know, I haven't made that computation.

"Q. It would be $6,000,000.00 profit in a period of ten years wouldn't it, on top of the return of the return of the capital of $4,000,000.00?

"A. I haven't made that computation.

"Q. Well, that is easy to figure. If you paid $4,000,000.00 for it at that time, and it ultimately would pay $10,000,000.00 in profits in the period of ten years, that—there would be $6,000,000.00 wouldn't there, returned?

"A. Yes.

"Q. That would be an average of $600,000.00 per year?

"A. That is correct.

"Q. Or 15 per cent upon the $4,000,000.00?

"A. On the assumption that is correct.

APPELLANT'S HIGHEST CLAIMS OF VALUE.

Throughout the brief, Appellant seeks to hold Mr. Day to a full payment of the highest values estimated and claimed as follows:

Greenough's highest estimate (p. 1059)	$10,750,000.00
Add, total of ore in transit as all profit though we have shown it is not,	1,048,864.14
Add actual cash balance between Hercules and smelter Oct. 28, 1916 (See p. 95)	370,521.13
Add, value of smelter and refinery as set	

forth p. 58 Appellant's brief..... 375,789.70

Total $12,555,174.97

Appellant makes no deductions for excess lengths and widths of ore, bodies, high prices nor erroneous measurements of Mr. Greenough. If these are deducted as heretofore shown, and the high prices which he assumes as fair are permitted to stand, we have the following as the highest which appellant could rightfully claim:

Valuation per estimates .....$ 6,270,108.97
Add Ore in Transit as all profit, which it is not 1,048,864.14
Add actual cash balance above shown.. 370,521.13
Add smelter and refinery 375,789.70

Total $8,065,283.94

According to Greenough's testimony, Mr. Day should receive the amounts hereafter shown upon his investment in the Cardoner interest (basis $5,000,000.00 for the mine and its properties, and $600,000.00 cash):

(a) $5,000,000.00 at 15 per cent for 13.75 years produces:

We add Principal $5,000,000.00
Interest... 8,312,500.00
Cash..... 600,000.00 Total.$15,912,500.00

(b) $5,000,000.00 at 15 per cent for 10 years, yields:
Principal $5,000,000.00
Interest... 7,500,000.00
Cash..... 600,000.00 Total.$13,100,000.00

(c) $5,000,000.00 at 12 1-2 per cent for 13.75 years produces:

Principal $5,000,000.00
Interest... 8,593,750.00
Cash..... 600,000.00 Total.$14,193,750.00

(d) $5,000,000.00 at 12 1-2 per cent for 12 years yields:
Principal $5,000,000.00
Interest... 7,500,000.00
Cash..... 600,000.00 Total.$13,100,000.00

(e) $5,000,000.00 at 12 1-2 per cent for 10 years produces:
Principal $5,000,000.00
Interest... 6,250,000.00
Cash..... 600,000.00 Total.$11,850,000.00

In all these examples we have added the principal for the double reason that the principal must first amortize in a mining investment and if invested elsewhere, the principal is always returned (theoretically).

These illustrations demonstrate that Mrs. Cardoner was overpaid or that she received a sum which was at least a "fair approximation of the actual value as of October 28, 1916," as we have allowed her to claim the impossible—an ideal theoretical return in advance.

By deducting the excess from the ore bodies erroneously assumed by Mr. Greenough, we have heretofore shown that at his prices the valuation should be $6,270,108.97.

Taking his rate—12 1-2 per cent—his shortest time—7.7 years (p. 1100) the result is as follows:

Principal $5,000,000.00
Interest... 4,812,500.00
Cash..... 600,000.00 Total.$10,412,500.00

whereas appellant's valuation would be:

Valuation per estimates	$ 6,270,108.97
Add Ore in Transit as all profit, which it is not	1,048,864.14
Add actual cash balance above shown	370,521.13
Add smelter and refinery	375,789.70
Total	$8,065,283.94

Mrs. Cardoner was overpaid.

WITNESS BURBIDGE.

In appellant's brief point 3, pp. 56 to 98, a discussion of the alleged value of this mine is set forth. In several places counsel attempts to show error in the work of Frederick Burbidge.

Mr. Burbidge omitted the first few years of the mine's life because of the extreme richness of the ore in both silver and lead, and the limited tonnage produced, as well as the high ratio of silver to lead.

Counsel claim this method deals unfairly with appellant.

This witness at pp. 890–907 and especially 901–903, estimates the tonnage and its reasonable value to show that Mrs. Cardoner was not defrauded. In stating the price at which he estimated lead values he says:

> "The period 1907 to 1916 included two boom periods when the price of lead was higher than normal. On the other hand, the cost of production was greater.
>
> "In the five years 1908–1912, inclusive, the net profit per ton of ore mined averaged $3.27. (p. 903).
>
> MR. GRAVES: What was the last period you gave?
>
> A. 1908–1912. This was the period of normal

prices for both lead and silver and labor, and other operating conditions were also normal."

After reviewing the situation, p. 904):

"Taking all these things into consideration as well as the decreasing silver content and the increase of zinc it was only possible to estimate the profit to be made on the remaining ore at from $2.50 to $3.00 per ton.

At other places he shows that his estimates of prices, production, and elements considered in this transaction, are based upon average normal conditions.

At pages 88 to 96 of appellant's brief, it is claimed, among other things, that Mr. Burbidge was unjust to Mrs. Cardoner in not estimating on the higher prices which had prevailed during the war period and the years which he denominated as "boom" years.

We shall not attempt any elaborate defense or praise of this witness. His position in his profession is well known; he ranks with the highest.

But to illustrate that this witness was entirely fair to Mrs. Cardoner and the defendants, and that appellant has miscalculated the value and also to show the errors of Mr. Greenough in his assumed lengths of ore bodies, we shall take the entire productivity of the Hercules mine, through its entire producing period. We are satisfied the results of this consideration will be more disastrous to appellant than the conservative testimony of Mr. Burbidge or the problems heretofore set out.

At page 91 of appellant's brief we find:

"The profits shown by the evidence to that date—October 28, 1916, were $11,915,886.74 to which should

be added $1,048,864.14 for ore in transit which had not been paid for up to that time making a total of profits to October 28, 1916, of $12,964,754.88, or an average profit of $7.29.

Counsel has here stated the error which we noted above, viz: he claims that ORE IN TRANSIT IS ALL PROFITS.

Reference to the tabulation heretofore set out in Statement No. 18 of this brief under the subject "SIZE, VALUE AND EXTENT OF KNOWN ORE BODIES ON OCTOBER 28, 1916" under the sub-head "ORE SHIPPED" shows the great decrease in the per cent of production of both lead and silver as well as the decreasing ratio which silver bears to lead in this Hercules ore; the figures show that the "HIGH-GRADE" originally found in the upper or first workings was far richer in both lead and silver and in the ratio of silver to lead, than either the present "HIGH-GRADE" or the Concentrates. We compare the years 1901 and 1902 with 1915 and 1916:

	TONS		DRY TONS		PER CENT
Year	Wet	Dry	% Lead	Oz. Silver	Calculated
1901	362	329	59.84	132.13	2.28
1902	5003	4840	62.34	83.92	1.34
1915	49442	47783	51.20	39.61	.773
	Conc.		53.14	58.57	1.100
1916	70026	68063	47.29	35.40	.747
	Conc.		47.95	34.33	.715

Note: 1916 calculations to October 28th, 1916, only.

Witness Greenough says (p. 1058):

"It is true that a s we get down on these ore bodies they become somewhat baser, more zinc comes in and more iron, and generally there is a GRADUAL decrease in the silver ratio, that is the amount of silver for each

unit of lead. To get at about what that would amount to, I have made certain estimates. At the beginning of this ten-year period the mill feed carried a ratio of 9.4 ounces of silver for each ten per cent lead content, and at the end of the period the mill feed carried a ratio of 8 ounces silver for ten per cent lead, so that the average silver ratio for the period would be 8.7 ounces for ten per cent lead. This is but a decline of 7-10th of an ounce below what it was at the beginning of the period."

It will be noticed that this witness based his calculations upon the mill feed. He therefore omitted the high grade, for the years 1906 to 1915; he did not calculate the decrease of mineral content nor of the ratio of silver to lead from 1901 to 1905, inclusive. He selected a ten-year period during six of which were two boom periods of prices.

PROBLEM 1.

No better way can be devised for showing the error of plaintiff's attorneys and her witness Greenough on this question of value than by considering the entire mine from its top workings to the Hummingbird tunnel. This perpendicular distance is 2252 feet, but enough ore still remained in the uncleaned stopes to make approximately 50 feet in depth at that tunnel, thus reducing the productive depth to 2202 feet, approximately 2200 feet.

This depth produced:

(a)	Dividends (September statement, p. 1357)	$10,379,527.72
(b)	Estimated dividends in ore in transit	400,000.00
(c)	Cash	370,521.13
	Total	$11,150,048.85

an average of $5,068.20 per foot depth.

Greenough estimates 1650 feet of remaining ore depth $10,750,000.00

But 1650 feet at $5,068.20 per foot is only 8,362,530.00

therefore, he has assumed a greater value per foot depth of the remaining ore bodies than that produced in the richest part of the mine.

Dividing Greenough's estimated remaining valuation—$10,750,000 by his estimated depth 1650 feet, we get an average per foot value of $6515 5-33. This is $1446.95 richer than the production above the No. 5 tunnel, and illustrates his error.

His testimony above quoted concedes that the ore gets leaner with depth.

PROBLEM 2.

In the complaint (Paragraph 6, pp. 18-19) is this allegation:

> "At the time of the transaction, for several years prior thereto, and at the present time, the Hercules properties were and are of the value of not less than $20,000,000.00, and plaintiff is informed and believes and thereon alleges the fact to be, that such properties were and are of the reasonable value of $30,000,000.00."

Plaintiff does not say whether these astounding figures are gross returns or net smelter returns, or dividends. But appellant treats the remaining ore values as dividends—and we shall do likewise.

At the basis above shown, to-wit: $5,068.20 per foot depth, these figures mean, upon the $30,000,00.00 basis, that the mine still has a depth of 5937 feet, which, added to the

2200 feet already worked out, gives a total depth of ore bodies of 8137 feet. Compared with other mines described in the testimony, this is more than twice as deep as the largest ore body ever discovered in that country; is three times as deep as several other mines, and is as high as four times as deep as still others. This depth of 8137 feet is over one and a half miles.

Upon the basis of $20,000,000.00, calculated similarly, the allegation is that the mine still contains a depth of 3958 feet of ore, which added to the 2200 feet already exhausted means 6158 feet, or more than double the average size of the larger ore bodies in neighboring mines, and more than one and one-sixth miles in depth.

Plaintiff failed to produce a single witness to testify to these absurd valuations.

When these depths are compared with Greenough's estimate of 1500 feet below the creek, or 1650 feet depth of remaining ore, it is seen that the $30,000,000.00 valuation approximates 300 per cent, and the $20,000,000.00 valuation approximates 200 per cent of his estimate.

ERRONEOUS ASSUMPTIONS.

At page 42 of appellant's brief, we find:

> "We believe from all the testimony in this case with reference to value, that the following are among the most essential facts necessary to determine the value of the mine, stated in the order of their importance;
>
> 1. Net income year by year, and particularly the present income.
>
> 2. The dvidends declared year by year, and aggregate.

3. The previous history of the mine and its production.

4. The conditions as they appear within the mine on the date value is sought to be proven.

5. The history, production and depth of mines of like character in the same locality or district."

We do not agree with this enumeration and we think it accounts for the false view that appellant has of this case.

If appellant's analysis is correct, upon what basis would he value an unworked but excellent new mine?

We are confident that the following items in their respective order are those which should be considered in determining the value of a mine:

1. The district where located and the history of neighboring mines.
2. The extent, mineral content, permanency and location of ore bodies.
3. The cost and means of extraction, transportation, treatment and the amount of mineral content which can be saved and marketed.
4. The amount of ore extracted and the amount of ore in reserve.
5. Approximate value of probable ore.

ERROR VI. (p.1408) and VII. (pp.1408-1409).

These errors charge that Day was administrator at the time of the purchase, and (Error VI) that he was precluded from purchasing the mining property, and (Error VII) the Burke property by R. C. Idaho, Sec. 5543. This subject is treated at pp. 98-99-100 appellant's brief.

The pendency of the administration at the time of the purchase, is disproven by these facts:

October 11, 1916—Decree of Final Distribution made and filed in the Probate Court of Shoshone county, Idaho; Mrs. Cardoner was represented by her attorney, John P. Gray, and his assistant, Mr. McNaughton; the administrator was represented by his attorney, John H. Wourms;

October 14, 1916—Actual possession of property was delivered to Mrs. Cardoner; the administrator settled with her; she appointed Allen as her agent; and notified E. R. Day and John Wourms thereof;

October 14, 1916—Allen, as agent for Mrs. Cardoner, checked E. R. Day's administrator's account (Allen, pp. 595 to 599);

October 16, 1916—Mrs. Cardoner discussed the sale of her interests with her agent, Allen, for the first time (Allen, pp. 599-600), and asked Allen if he would see what he thought she could get for it; she told Allen she thought Gene Day might but it (p. 600-bottom).

Thereafter, Allen got Day's receipt (Exhibit No. 13, p. 1185), and discussed the sale with him. (Allen, pp. 602 to 604);

October 21, 1916—Allen saw Mrs. Cardoner and told her what Day had offered, and discussed getting a higher price for her interest, (pp. 604 to 606), and advised her to consult with Paulsen and Hutton, (p. 606);

October 25, 1916—Certified copy of Decree of Distribution recorded with County Recorder;

From October 21 to 27, 1916—Allen saw Mr. Day several times and demanded one-sixteenth of $6,000,000.00

for the Cardoner interest; Day refused to buy the interest for that sum, telling Allen when he made his last offer that he (Day) was through, to offer it to someone else.

E. R. Day, pp. 736-737-804;

Allen, pp. 604-605; 610; 616-617;

October 27, 1916—Mrs. Cardoner came to Wallace (Allen, p. 611), and saw her agent, Allen, who told her —"I told her that I had put the proposition up to Mr. Day on a $6,000,000.00 basis and he absolutely refused to consider it." (p. 616).

Mrs. Cardoner and Allen then fixed the final price (p. 617), but thereafter, the Burke property was raised $5,000.00 (pp. 618-619) at Mrs. Cardoner's express request (pp. 618-619);

October 28, 1916—Option contract and deed made; payment of $50,000.00 on contract accepted by Mrs. Cardoner. This was to be forfeited in the case the purchase was not completed;

October 29, 1916—At the Old National Bank in Spokane, Washington, Mrs. Cardoner paid Allen $5,000.00 as his commission without denying that he was her agent.

Vincent, p. 698-702;

Allen, pp. 662-664;

November 1, 1916—Formal order of discharge of administrator duly entered;

November 14, 1916—Balance of purchase price ($320,000.00) paid.

It is thus seen that the decree of distribution was made and filed and actual possession of the estate was delievered to the

heir, who appointed a new agent and notified E. R. Day thereof, before any negotiations for the sale were begun. It further appears that the decree of distribution was recorded prior to the conclusion of the contract; and the payment of practically 87 per cent of the purchase price—the last payment—was made after the technical discharge of the administrator had been duly entered.

The decision upon this question (pp. 1376-1381) is so clear and exhaustive that we cannot add to its lucid statement or convincing power. His conclusions are sustained by the authorities there cited, to-wit

Wheeler v. Bolton, 54 Cal. 302.
Moore v. Lauff, 158 Pac. 557;
Morfew v. S. F. & S. R. R. Co., 40 Pac. 810;
Buckley v. Superior Court, 36 Pac. 360.

See authorities under Point V Page 76

Moore v. Lauff, 158 Pac. 557 (558-559) holds that a complaint showing final decree of distribution and delivery of estate to heirs who divide the property, shows that the estate has been closed, that the holder of a note so distributed is the legal holder and that it does not belong to the estate. An appeal based upon the opposite contention was dismissed as frivolous, with penalty.

The court says (158 Pac. 559):

"(6) As stated above, there is absolutely no merit whatever in this appeal, and it would be an unjust imputation against counsel for the appellant, to hold that he did not realize the utter futility of the appeal when taking it. We may therefore properly assume that the appeal was designed to accomplish no other purpose than to delay the execution or satisfaction of the judgment.

Accordingly the judgment is affirmed with damages awarded against the appellant in the sum of $50.00"

ERRORS NO. VIII (p. 1409) and IX (p. 1409).

These assignments challenge the sufficiency of the evidence to show that Mrs. Cardoner was informed of the known conditions and facts bearing upon the value of the property; and, that the price paid approximated its reasonable market value.

These questions have been considered in discussing Errors No. II.-III.-IV.-V.- and X.

At pp. 1400-1401, Judge Dietrich says:

> "Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

The insistence with which appellant's counsel assail this finding impels a brief summary of facts showing,

MRS. CARDONER'S KNOWLEDGE:

1. About 1883, she came to San Francisco from Spain.
2. In 1886, she lived at Murray, Idaho, in the Coeur d'Alenes and ran the store there, while her husband went to Burke, Idaho, where she later joined him;
3. From 1886 to 1906 (twenty years), the Cardoners lived at Burke, in close proximity to the Hercules,

Tiger-Poorman and the Hecla mines; and in the same vicinity as the Standard, Mammonth, Gem, Frisco and Black Bear mines;

4. They acquired a 1-16 interest in the Hercules mine before it began paying dividends;
5. In 1901, the mine paid its first dividends, aggregating $8,000.00 , of which they received $500.00;
6. In 1903 Mrs. Cardoner filed her divorce suit alleging the value of the mine at $2,000,000.00, and showing that Mr. Cardoner owned a large interest in the Hummingbird—an adjoining claim;
7. In 1906, the Cardoners moved to Spain. At that time the ore shipped by the Hercules had yielded net smelter returns of $3,690,539.57, of which $2,410,300.00 had been paid in dividends, the Cardoners receiving $150,643.75 as their share;
8. From 1906 to 1916, and during their residence in Spain, the Cardoners received the regular monthly statements; subscribed for and read the Press-Times of Wallace, Idaho, and the Spokesman-Review of Spokane, Washington, and other mining papers, and kept in close touch with all matters pertaining to mining in the Coeur d'Alenes;
9. The September, 1916, statement, which Mrs. Cardoner had, when she sold, showed dividends declared and paid aggregating $10,379,527.72, of which the Cardoners' 1-16 was $648,720.48, and in the sale she received an additional $350,000.00 for her interest in the mining properties and cash, aggregating $998,720.48, which their part of the mine had yielded.

10. From April to October, 1916, Mrs. Cardoner was in constant touch with the mine management; and her co-owners Eugene R. Day, Paulsen, Hutton, and her agent, Allen, discussed with her the smelter, refinery, ore in transit, cash on hand, improvements made at the mine from 1906 to 1916, giving her accurate and reliable information;

11. She knew the mine was practically worked out to the No. 5 tunnel, a depth of 2252 feet; she knew the depth of adjacent mines (Allen, p. 612 et. seq.), and therefore knew that the Hercules had exhausted a greater depth than the Tiger-Poorman had when it was closed down, and that such depth (2252 feet) was greater than several other mines;

12. Eugene R. Day told her the probable depth of ore bodies below the No. 5 tunnel; of the disclosures of ore from the workings below that tunnel, and of the advantageous position the company occupied by its ownership in the smelter and refinery, etc.

13. In 1904, her husband joined in the option to Adams (basis, $4,000,000.00) for the property, and from 1904 to 1916 the ore extracted yielded $20,001,406.10, net smelter returns, from which dividends were paid aggregating $10,019,527.72, of which the Cardoners received $626,220.48;

14. After Hutton told her he estimated the mine still worth $4,000,000.00, she had Allen, her agent demand $6,000,000.00 from E. R. Day under the threats heretofore shown; upon Day's refusal to pay this price and informing her to sell elsewhere, she acted with her agent and fixed her own price at a

basis $5,600,000.00 for the mine's properties and cash;

15. From 1886, when the Cardoners first settled in the Coeur d'Alenes, to 1916, the date of the sale, is thirty years, and in that period, the entire Coeur d'Alene district was discovered and developed and Mrs. Cardoner kept accurately informed as to mining matters within the district;

In view of these facts counsel's argument "that she had no inforamtion, etc.," overtaxes credulity.

ERROR X.

INNOCENT PURCHASERS.

Appellees Harry L., and Jerome J., Day, respectively, purchased an undivided one-fourth interest in the former Cardoner interest, between October 28th, and November 14th, 1916, paying in full therefor on November 14th, 1916, prior to any notice or claim of any fraud in the original transaction.

Separate deed to each was executed by Eleanor Day Boyce on January 5th, 1917, and by Edward Boyce on April 5th, 1917, and recorded April 9th, 1917. (R. p. 967).

The defense of innocent purchaser is interposed by them, severally.

Pomeroy's Equity, 4th Ed., Vol. 2, Sec. 691, says:

> "In the United States a different, and it seems to me, more just rule has generally been established,—that where the estate subsequently purchased is the legal estate, a notice in order to be binding, must be received before the purchaser has paid the price. * * * [f

he actually pays the valuable consideration without any notice, a notice afterwards given does not preclude him from completing the transaction, obtaining conveyance of the legal title and thereby securing the precedence due to bona fide purchaser * * * without notice."

See also, Pomeroy's Eq. 4th Ed., Vol 2, Sec. 755, Note 5-a.

U. S. v. Detroit T. & L. Co., 200 U . S. 320-321; 50 L. Ed. 499; aff'g. 131 Fed. 668.

Each of these purchasers had a right to presume good faith in the original transaction and that everything had been properly done; the large price paid to Mrs. Cardoner, which Harry L., and Jerome J., Day each regarded as excessive was ample proof to them that appellant had been liberally and fairly dealt with.

Appellant's brief (pp. 23 point 5; 25, point 6; and 101) treats this subject upon the theory that E. R. Day was agent for the other members of the Day family in this transaction. E. R. Day (pp. 802-810) and Harry L. Day (pp. 980-981) testified to the contrary and their evidence is not disputed.

Furthermore, the record shows (pp. 981-982) while Harry L. Day was testifying:

Q. I will ask you Mr. Day whether it is true, and if not to what extent it is not true, the assertion or suggestion that everything that one of you three brothers goes into that all the rest go in with your sister, and are partners in everything?

A. It is not correct. I am interested in a number of properties which the others are not interested in. Some are with me and some are not.

Q. Just illustrate the situation briefly.

A. Well, my brother is,——

Mr. Graves: In view of the testimony which Mr. Day has given as to this transaction, may it please the court, I am perfectly willing to waive any claim of that sort that may appear in the pleadings, or in any part of the contention if that will shorten things.

* * *

Mr. Graves: I will waive any contention of that sort if it appears anywhere in this proceedings. I don't remember that it has appeared.

Mr. Babb: Well, I would have to have it waived absolutely whether it is plain that it appears anywhere in this proceeding or not.

Court: It is understood that it is waived absolutely.

Mr. Graves: I am just waiving the contention that what one of them went into always, the others went into.

This partnership between the co-owners of this mining property was not a general partnership; it has many incidents not like those of a general partnership.

Here, Mrs. Cardoner's share of the property was not held by Eugene R. Day in trust. Each partner owned his interest in the property itself, in severalty. Mr. Day managed the partnership business, only, viz: the working of the co-owners' property; he had no ownership of the several interests owned by the respective partenrs, nor was he trustee for that purpose. The distinction is clearly drawn in,

Perry on Trusts, p. 316, Note A.

Bissell v. Foss, 4 Fed. 694; aff'd 114 U. S. 252; 29 L. 126.

Furthermore, E. R. Day did not conduct this sale,—did not as trustee, but at his own sale. Mrs. Cardoner conducted her own sale of her separate interest, to a mining co-partner —not to a general co-partner.

Mills v. Mills, 63 Fed. 511.

Cole v. Stokes, 113 N. C. 270.

Bissell v. Foss, 114 U. S. 252 (supra).

From Bissell v. Foss, 4 Fed. aff'd 114 U. S. 252; 29 L. 126, we quote these expressions relative to mining partners:

"Each was at liberty to purchase from the other * * * as a stranger might" (p. 699); "The parties were in a very large sense involuntary associates" (p. 701); "They came together on the ground that they were tenants in common of the mine and not upon any agreement to engage in the business" (701); "were partners in the working but not in the ownership, * * * and their firm was a thing of the hour without hope of existence. * * * The object .. was to take out ore * * * Beyond that that were entirely free to act touching their interest in the mines, as well as other individual property."

ERRORS IN APPELLANT'S BRIEF:

Appellant's brief contains many plain errors which we deem necessary to point out:

1. Constant reference is made to "mines," "refineries," "smelteries," "mills," etc. This case involves ONE mine, ONE mill, ONE refinery and ONE smelter.
2. At page 68 of brief, appellant misquotes, and does

not complete Burbidge's testimony. Compare Burbidge p. 904-901;

3. At p. 45 et. seq. brief says: "An analysis of these exhibits shows that the information as to the net income of the mine is not given." Compare Allen pp. 612-613; 643-644 et. seq. and the March, 1916 statement;

4. At pp. 48 and 49 erroneous conclusions are stated as to the years 1915 and 1916. Compare anaylsis of September, 1916, statement heretofore set out; also items making up the balance shown therein;

5. At p. 52 appellant misconstrues E. R. Day's testimony, and by quoting only part of it, gives a wrong impression concerning same. Compare E. R. Day pp. 860 to 808 inclusive;

6. At p. 46 appellant gives the impression that dividends were suppressed in 1915 and 1916. The reason of small dividends during those years was explained to Mrs. Cardoner by Paulsen, Day, etc.;

7. At p. 47 counsel argues calculated production after the sale. This is improper;

8. At p. 47 the impression is given that the Hercules will be worked in the future at the rate during the war, and hence, will exhaust the entire ore bodies in about three and one-half years;

9. The ore in transit is persistently repeated as "all profit."

10. At page 53, point 5, appellant says Burbidge testified that the Tiger mine was sunk 2200 feet and that Day told Mrs. Cardoner that it was only sunk 1500 to 1600 feet. Burbidge said the mine paid only to

a depth of 1800 feet below the creek level (p. 901) and Day told Mrs. Cardoner its depth was from 1500 to 1800 feet below the creek level;

11. At p. 58 appellant treats the listed property as no part of the mine. The testimony is otherwise.

12. At p. 88 and 89 counsel assume a continuous profit upon war prices, which of course cannot continue;

13. At pp. 90 to 95 the argument is made that several million dollars had been spent for development, machinery and equipment that would not have to be duplicated. The evidence does not show what it would cost to rehabilitate the smelter, the refinery, or to replace other broken and worn machinery. In addition, the mine was changing from a tunnel to a shaft mine with added operating costs.

14. At pp. 92 and 93 counsel repeats his error charging that approximately one million dollars has been spent for property not connected with the mine. The evidence disposes of this statement.

15. At p. 83 the statement is made that Jerome J. Day * * * "testified to numbers of mines that had been failures in the Coeur d'Alene district." This is a misconstruction of his testimony. He stated these mines are in the vicinity of the Hercules, some of them adjoining. (pp. 1006-1010).

16. At pp. 23, point 5, and 25, point 6, appellant says that Eleanor Day Boyce pleads innocent purchase. She made no such plea.

17. At pp. 44 and 45 counsel argue that Mrs. Cardoner received her sole information of net income, etc., from Eugene R. Day and the statements. This dis-

regards Allen's testimony at p. 612 et. seq.; also 643 et. seq.

18. At pp. 43 to 47 et. seq., it is said Mrs. Cardoner had a right to believe, unless other wise informed that the dividends would approximate the earnings, etc. The monthly statements and the tabulated sheet heretofore set out refute this. These items were never coequal.

Other errors might be pointed out in appellant's brief but space forbids.

We respectfully submit, that the decision (pp. 1373-1401) is remarkable, for clearness of diction, elegance of expression, lucidity of narrative, comprehension of detail, nicety of analysis, fairness of consideration, soundness of logic and justice of conclusion.

We respectfully urge that it be affirmed.

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